

Provisional text

OPINION OF ADVOCATE GENERAL  
BOBEK  
delivered on 19 November 2020([1](#))

**Case C-505/19**

**WS**  
v  
**Bundesrepublik Deutschland**

(Request for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany))

(Reference for a preliminary ruling – Red notice of the International Criminal Police Organisation (Interpol) – Article 54 of the Convention implementing the Schengen Agreement – Article 50 of the Charter of Fundamental Rights of the European Union – Principle *ne bis in idem* – Article 21 TFEU – Free movement of persons – Directive (EU) 2016/680 – Processing of personal data)

## I. Introduction

1. The present case raises two novel issues concerning the consequences flowing from the application, within the Schengen area, of the principle *ne bis in idem*, in relation to acts for which the International Criminal Police Organisation (Interpol) has published a red notice at the request of a third State. Red notices are issued for persons wanted either for prosecution or to serve a sentence. They are, in essence, requests to law enforcement authorities worldwide to locate and, where possible, provisionally restrict the movements of requested persons pending a request for their extradition.

2. First, are EU Member States authorised to implement the red notice, and thus restrict the requested person's movements, where another EU Member State has notified Interpol and, by the same token, all other members of Interpol, that that notice relates to acts for which the principle *ne bis in idem* may be applicable? Second, are EU Member States allowed, where the principle *ne bis in idem* does apply, to further process the personal data of the requested person contained in the red notice?

## II. Legal framework

### A. International law

3. According to Article 2(1) of Interpol's Constitution, adopted in 1956 and amended most recently in 2008, one of Interpol's aims is:

'To ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights".'

4. Article 31 of Interpol's Constitution states: 'In order to further its aims, [Interpol] needs the constant and active cooperation of its Members, who should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities.'

5. Pursuant to Article 73(1) of Interpol's Rules on the Processing of Data ('the IRPD'), adopted in 2011, as amended most recently in 2019, Interpol's notices system consists of a set of colour-coded notices published for specific purposes and special notices. Red notices are normally published at the request of a National Central Bureau ('NCB') 'in order to seek the location of a [requested] person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action' (Article 82 of the IRPD). Under Article 87 of the IRPD, if a person who is the subject of a red notice is located, the country where the person has been located shall: '(i) immediately inform the requesting National Central Bureau or international entity and the General Secretariat of the fact that the person has been located, subject to limitations deriving from national law and applicable international treaties;' and '(ii) take all other measures permitted under national law and applicable international treaties, such as provisionally arresting the [requested] person or monitoring or restricting his/her movement'.

#### **B. EU law**

6. Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (2) ('the CISA'), included in Chapter 3 (entitled 'Application of the *ne bis in idem* principle') thereof, provides:

'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.'

7. Article 57(1) and (2) of the CISA, states:

'1. Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered.

2. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way.'

8. According to recital 25 of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, (3) all Member States are affiliated to Interpol, and it is 'therefore appropriate to strengthen cooperation between the Union and Interpol by promoting an efficient exchange of personal data whilst ensuring respect for fundamental rights and freedoms regarding the automatic processing of personal data'.

9. According to the definition contained in Article 3 of Directive 2016/680, ‘processing’ means ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction’.

10. Pursuant to Article 4(1) of Directive 2016/680, personal data must, *inter alia*, be ‘processed lawfully and fairly’, ‘collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes’, and ‘adequate, relevant and not excessive in relation to the purposes for which they are processed’.

11. Under Article 8(1) of the same directive, ‘Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law’.

12. In accordance with Article 16 of Directive 2016/680, data subjects must enjoy a ‘right to rectification or erasure of personal data and restriction of processing’.

13. Chapter V of Directive 2016/680 (composed of Articles 35 to 40) is entitled ‘Transfers of personal data to third countries or international organisations’ and regulates, *inter alia*, the conditions under which personal data may be transferred to a third country or to an international organisation.

### C. National law

14. Paragraph 153a(1) of the Strafprozessordnung (German Code of Criminal Procedure, ‘the StPO’) provides, in the case of offences punishable by a fine or a minimum term of imprisonment of less than one year, that the Staatsanwaltschaft (Public Prosecutor’s Office) may, with the agreement of the court having jurisdiction for the commencement of the main proceedings and of the person subject to criminal proceedings, provisionally waive the right to take public action while imposing conditions and injunctions on the said person, such as the payment of a sum of money to a charity or to the public treasury, where these are such as to remove the public interest from the institution of proceedings and where the seriousness of the offence does not preclude it. If the person subject to criminal proceedings complies with the conditions and injunctions, the conduct in question may no longer be prosecuted as an offence.

15. Under Paragraph 3(1) of the Gesetz über das Bundeskriminalamt und die Zusammenarbeit des Bundes und der Länder in kriminalpolizeilichen Angelegenheiten (Law on the Federal Office of Criminal Police (‘the BKA’) and Cooperation between the Federal State and the *Länder* in Criminal Police Matters) of 1 June 2017, (4) the BKA is the national central office of the Federal Republic of Germany for cooperation with Interpol.

## III. Facts, national proceedings and the questions referred

16. In 2012, at the request of the competent authorities of the United States of America, Interpol issued a red notice concerning a German citizen residing in that country (‘the applicant’), for the attention of all national central offices, with a view to locating him, arresting him or restricting his movements for extradition purposes. The red notice was based on an arrest warrant issued by the United States’ authorities for, *inter alia*, charges of corruption, money laundering and fraud.

17. According to the referring court, the Public Prosecutor’s Office in Munich (Germany) had already initiated an investigation procedure against the applicant concerning the same acts as those covered by the red notice. Those proceedings were discontinued in 2009 after the applicant paid a certain sum of money, in accordance with Paragraph 153a(1) of the StPO.

18. In 2013, following an exchange with the applicant, the BKA requested and obtained the publication of an addendum to the red notice in question from Interpol, stating that the BKA considered that the principle *ne bis in idem* was applicable in relation to the charges for which that notice had been issued. In addition, the German authorities asked the US authorities, albeit unsuccessfully, to delete the red notice.

19. In 2017, the applicant brought an action before the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) against the Federal Republic of Germany, represented by the BKA. He requested that the defendant be ordered to take the necessary measures to remove the red notice. The applicant stated that he could not travel to any State party to the Schengen Agreement without risking arrest. Indeed, because of the red notice, those States had placed him on their lists of requested persons. That situation was, according to the applicant, contrary to Article 54 of the CISA and Article 21 TFEU. In addition, the applicant maintained that the further processing, by the Member States' authorities, of his personal data contained in the red notice was contrary to the provisions of Directive 2016/680.

20. Against that background, harbouring doubts as to the proper interpretation of the relevant provisions of EU law, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden) decided, on 27 June 2019, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Is Article 54 of the CISA in conjunction with Article 50 of the Charter [of Fundamental Rights of the European Union; 'the Charter'] to be interpreted as meaning that even the initiation of criminal proceedings for the same act is prohibited in all the Contracting States of the [Schengen Agreement] if a German public prosecutor's office discontinues initiated criminal proceedings once the accused has fulfilled certain obligations and, in particular, paid a certain sum of money determined by the public prosecutor's office?
- (2) Does Article 21(1) [TFEU] result in a prohibition on the Member States implementing arrest requests by third States in the scope of an international organisation such as [Interpol] if the person concerned by the arrest request is a Union citizen and the Member State of which he or she is a national has communicated concerns regarding the compatibility of the arrest request with the prohibition of double jeopardy to the international organisation and therefore also to the remaining Member States?
- (3) Does Article 21(1) TFEU preclude even the initiation of criminal proceedings and temporary detention in the Member States of which the person concerned is not a national if this is contrary to the prohibition of double jeopardy?
- (4) Are Article 4(1)(a) and Article 8(1) of Directive [2016/680] in conjunction with Article 54 of the CISA and Article 50 of the Charter to be interpreted as meaning that the Member States are obliged to introduce legislation ensuring that, in the event of proceedings whereby further prosecution is barred in all the Contracting States of the [Schengen Agreement], further processing of red notices of [Interpol] intended to lead to further criminal proceedings is prohibited?
- (5) Does an international organisation such as [Interpol] have an adequate data protection level if there is no adequacy decision under Article 36 of Directive [2016/680] and/or there are no appropriate safeguards under Article 37 of Directive [2016/680]?
- (6) Are the Member States only allowed to further process data issued by [Interpol] in a red notice by third States when a third State has used the red notice to disseminate an arrest and extradition request and apply for an arrest which is not in breach of European law, in particular the prohibition of double jeopardy?

21. The referring court requested that the case be dealt with under the urgent preliminary ruling procedure provided for in Article 107(1) of the Rules of Procedure of the Court of Justice. By order of 12 July 2019, the Court decided that it was unnecessary to grant that request.

22. On 5 September 2019, at the request of the US authorities, the red notice concerning the applicant was deleted by Interpol.

23. In its reply of 11 November 2019 to a request from the Court concerning the consequences of that event on the present proceedings, the referring court informed the Court of its intention to maintain the request for a preliminary ruling. The referring court explained that the applicant asked for the subject matter of the action in the main proceedings to be amended. The applicant is now asking the referring court to order the Federal Republic of Germany to take all the necessary measures (i) to prevent a new red notice concerning the same acts from being issued by Interpol and, should that occur, (ii) to delete the new red notice. The referring court explains that, under national law, it is possible to amend the subject matter of the action and consider it as concerning an action for a declaration which is a continuation of a previous action ('*Fortsetzungsfeststellungsklage*'). The referring court thus considers that the questions raised remain relevant for the resolution of the dispute before it.

24. Written observations in the present proceedings have been submitted by the applicant, the BKA, the Belgian, Czech, Danish, German, Greek, French, Croatian, Netherlands, Polish, Romanian and United Kingdom Governments, as well as the European Commission. The applicant, the BKA, the Belgian, Czech, Danish, German, Spanish, French, Netherlands and Finnish Governments, as well as the Commission also presented oral argument at the hearing on 14 July 2020.

#### IV. Analysis

25. The referring court asks the Court in essence whether EU law precludes Member States, when a red notice is issued by Interpol at the request of a third State and that notice relates to acts for which the principle *ne bis in idem* may be applicable, from (i) implementing that notice by restricting the freedom of movement of the requested person, and (ii) further processing his or her personal data contained in the notice.

26. At the outset, it may be helpful to explain briefly what a red notice is. Pursuant to Article 82 of the IRPD, red notices are published at the request of national or international authorities with powers of investigation and prosecution in criminal matters 'in order to seek the location of a [requested] person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action'. Article 87 of the IRPD states that if a person who is the subject of a red notice is located, the authorities of the country where the person has been located are to immediately inform the requesting authorities and Interpol of the fact that the person has been located, and 'take all other measures permitted under national law and applicable international treaties, such as provisionally arresting the [requested] person or monitoring or restricting his/her movement'.

27. The issuance of a red notice by Interpol is, therefore, a mere request for assistance from one member of Interpol to the other members, in order to locate and, where possible, restrict the movements of a requested person. A red notice does not amount to, or automatically trigger, a request for extradition, which must, as the case may be, be formulated separately. It is nonetheless clear that a red notice is issued with a view to carrying out extradition or similar proceedings.

28. Having clarified that point, and before looking at the substantive issues raised by the present case, a number of procedural issues must be addressed.

##### A. *Admissibility of the reference and the ongoing need to reply*

29. In the first place, the BKA and the Belgian, Czech, German, Greek, Netherlands and United Kingdom Governments expressed doubts regarding the admissibility, *ab initio*, of the reference. Their arguments put forward in this regard can be placed into four categories, suggesting essentially that: (i) the order for reference does not include sufficient detail about the relevant factual situation; (ii) the situation at issue in the main proceedings is confined to Germany and has no actual cross-border element; (iii) the

action before the referring court is inadmissible, and/or at any rate unfounded; and, (iv) that action is abusive since it is directed at contesting the competence of Member States other than Germany to implement a red notice.

30. I am unconvinced by those objections.

31. First, it is true that the order for reference is particularly succinct. However, that order, as completed by the submissions of the parties, does enable the Court to know what questions are being asked by the referring court and why. Therefore, the Court has before it the factual and legal material necessary to give a useful answer.

32. Second, the situation at issue in the main proceedings is by no means purely internal to Germany. On the one hand, although the dispute indeed concerns a German citizen residing in that country, who challenges the conduct of the German authorities, the reason for that challenge is the alleged restriction of his freedom of movement throughout the Union, enshrined in Article 21 TFEU. The Court has consistently stated that the provisions granting the rights to free movement, including Article 21 TFEU, must be interpreted broadly. (5) The fact that a Union citizen may not (yet) have made use of his rights does not mean that the situation is purely internal. (6) Article 21 TFEU can, to my mind, be relied on by an individual who is actually and genuinely seeking to make use of that freedom. (7) That is certainly the situation of the applicant: his activities prior to and during the main proceedings – especially his exchanges with the BKA and the public authorities of several other Member States – clearly demonstrate that his intention to make use of that freedom is not purely hypothetical or invoked instrumentally. (8)

33. On the other hand, the applicability of Directive 2016/680 is not limited to cross-border situations. In fact, that is also true of Article 50 of the Charter, as well as Article 54 of the CISA: both of these provisions may clearly apply even in cases in which a national is facing the authorities of his or her own Member State.

34. Third, it is not for the Court to assess whether the action in the main proceedings is admissible, let alone well founded. According to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not for the Court to check, enjoy a presumption of relevance. (9) That presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to verify, on which the delimitation of the subject matter of those proceedings depends. (10) Likewise, that presumption will not be rebutted by the possibility that the applicant could be ultimately unsuccessful in the main proceedings before the national court, in particular if a certain interpretation of the EU law at issue is embraced by the Court. To deny admissibility because of the potentially negative answer on merits would indeed amount to putting the cart before of the horse.

35. Finally, I note that the main proceedings have been brought against the German authorities – who are the defendant before the referring court – and any decision of that court in those proceedings will naturally only have legal effects vis-à-vis those authorities. The fact that, in order to assist the referring court, this Court will also need to clarify the obligations flowing from the EU provisions in question for Member States other than Germany cannot call into question the admissibility of the reference. It is true that the Court has refused to rule in contrived cases, brought merely with a view to having the Court adjudicate on the EU-related obligations of Member States other than the referring court.(11) However, in the present case there is no information pointing to the fact that the dispute before the referring court has been artificially construed in order to induce the Court to take a position on certain interpretative problems that, in reality, do not serve any objective requirement essential to the resolution of that dispute. Moreover, the fact that an answer given by the Court on the rights or obligations of one Member State will have (horizontal) implications for the other Member States is simply inherent in issues concerning free movement between the Member States and the related elements of mutual recognition amongst them.

36. In the second place, the BKA and the Belgian, Czech, German, Spanish, Finnish and United Kingdom Governments also argue that the questions referred have now become hypothetical. They contend that, in so far as the red notice at issue in the main proceedings was deleted by Interpol in September 2019, an answer to the questions referred is no longer necessary for the referring court to decide the case before it.

37. However, as mentioned in point 23 above, when questioned by the Court on this specific point, the referring court explained that, under national law, the applicant is permitted to amend his form of order and, as a matter of fact, he did exercise that right. Thus, the action before the referring court is, to date, (still) pending and, according to that court, its outcome (still) depends on the interpretation of the EU provisions that are the subject matter of the questions referred.

38. Moreover, the referring court suggested, without that suggestion being contested by the BKA or any other party who submitted observations, that the red notice at issue could at any time be re-introduced into the Interpol system following another request of the competent US authorities.

39. In the light of the above, and account being taken of the presumption of relevance which requests for preliminary rulings enjoy, I am of the view that the present reference has not become devoid of purpose, despite the withdrawal of the red notice.

## ***B. Substance***

40. This Opinion is structured as follows. I shall start with the first, second and third questions, all of which relate to the applicability of the principle *ne bis in idem* in the present case and, if so, to the consequences for the other Member States as regards their capacity to implement the red notice issued by Interpol (1). Next, I shall examine the fourth, fifth and sixth questions, which enquire as to the consequences stemming from the applicability of the principle *ne bis in idem* in respect of the processing of the requested person's personal data contained in the red notice. However, I will address the issues raised in the fourth and sixth questions only (2), since I consider the fifth question to be inadmissible (3).

### ***1. First, second and third questions***

41. By its first, second and third questions, which are best dealt with together, the referring court asks essentially whether Article 54 of the CISA, in conjunction with Article 50 of the Charter, and Article 21(1) TFEU, preclude the Member States from implementing a red notice issued by Interpol at a request of a third State, thereby restricting a Union citizen's freedom of movement, where another Member State has notified Interpol (and thus also the other members of Interpol) that that notice relates to acts for which the principle *ne bis in idem* may be applicable.

42. In order to answer that question, it must first be examined whether a measure such as that adopted by the Munich Public Prosecutor with the agreement of the competent court vis-à-vis the applicant in 2009 could per se trigger the application of the principle *ne bis in idem* (a). Next, provided that the principle *ne bis in idem* were indeed to be validly triggered, I shall examine whether that principle could constitute a bar to extradition to a third State, thus precluding the adoption of restrictive measures that are instrumental to that end (b). I shall then turn to the actual scenario of the present case in which it would appear that the application of the principle *ne bis in idem* to a specific case has not yet been established (c).

#### ***(a) The applicability of the principle *ne bis in idem* to terminations of criminal proceedings other than by a judgment of a court***

43. At the outset, it is necessary to ascertain whether a measure such as that adopted by the Public Prosecutor vis-à-vis the applicant in 2009 could even trigger the application of the principle *ne bis in idem*. The applicability of Article 54 of the CISA is conditional on there being 'a trial finally disposed of in one Contracting Party', which would then preclude subsequent prosecution for the same act in the other Member States.

44. To my mind, a decision by which a public prosecutor definitively discontinues criminal proceedings with the agreement of the competent court, and which after the accused has satisfied certain conditions, precludes any further prosecution under national law, falls within the scope of application of Article 54 of the CISA. There is, indeed, already consistent case-law in this matter.

45. In *Gözütok and Brügge*, the Court first addressed the issue and found that the principle *ne bis in idem*, laid down in Article 54 of the CISA, ‘also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, [criminal proceedings] brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor’. (12)

46. Those findings have been confirmed and clarified in subsequent case-law concerning Article 54 of the CISA. In *M*, the Court stressed that, for the principle *ne bis in idem* to apply, it is necessary, in the first place, that further prosecution has been *definitively barred*. (13) In *Spasic*, the Court stressed the importance that the ‘execution condition’ – according to which, if a penalty has been imposed, that penalty ‘has been enforced, is actually in the process of being enforced or can no longer be enforced’ – be satisfied, in order to avoid the impunity of persons definitively convicted and sentenced in an EU Member State. (14)

47. By contrast, in *Miraglia*, the Court held that Article 54 of the CISA does not apply to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor had decided not to pursue the prosecution on the sole ground that criminal proceedings had been started in another Member State against the same defendant and for the same acts, *without any determination whatsoever as to the merits of the case*. (15) Similarly, in *Turanský*, the Court held that Article 54 of the CISA cannot apply to a decision of the *police authorities* who, after examining the merits of the case, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under national law, definitively bar further prosecution and therefore *does not preclude new criminal proceedings*, in respect of the same acts, in that State. (16)

48. In *Kossowski*, the Court made clear that a public prosecutor’s decision closing the investigation procedure against a person, with the possibility of that procedure being reopened or annulled and without any penalties having been imposed, cannot be characterised as a final decision when it is clear from the statement of reasons for that decision that the procedure was closed *without a detailed investigation* having been carried out. (17)

49. In summary, there are, on the one hand, final decisions on a criminal offence (the presence or absence of its constitutive elements or other specific types of decisions not containing such a statement but amounting to an effective settlement of the case) that will, under national law, preclude any subsequent prosecution for the same act in the same Member State and hence also in other Member States. On the other hand, there are other types of discontinuation of criminal proceedings or their non-opening, typically carried out by the police authorities at national level, that do not trigger such consequences. Such a dividing line is rather intuitive, but difficult to exhaustively capture in view of the various rules and procedures in the Member States: for the principle *ne bis in idem* to be validly triggered, there must be a final statement from a Member State that authoritatively defines the extent of the *idem* that may then start precluding the *ne bis*. If, metaphorically speaking, that space is left free, there is nothing to prevent the other Member States from conducting investigations and prosecutions themselves.

50. Thus, the answer to be given to the first question of the referring court is indeed in the affirmative: assessed *in abstracto*, a decision of a public prosecutor, who having assessed the case on its merits and with the agreement of the competent court, definitely discontinuing criminal proceedings once the accused has satisfied certain conditions, falls within the scope of Article 54 of the CISA.

51. However, the fact that such a type of national decision comes within the scope of Article 54 of the CISA, potentially amounting to *a trial that has been finally disposed of in one Contracting Party*, is several steps removed from the possible implications that the referring court is enquiring about in its second and third question. In particular, what appears to be lacking is the next logical step necessary for any issues under Article 21 TFEU to arise: a final, authoritative finding from the relevant authority of a Member State confirming the identity of the acts in question (the *idem*), thus triggering the *ne bis* with regard to the same acts across the Union, which could then also potentially have some effects on extradition requests from third States.

52. I shall nonetheless, in view of the submissions of the parties and the discussion that took place at the hearing on the basis of those submissions, for the moment go along with the factual and legal assumptions inherent in the second and third questions posed by the referring court. In particular, in response to question three, would Article 21(1) TFEU, in addition to barring any subsequent prosecution in other Member States, also preclude the temporary detention in the other Member States in view of the possibility of future extradition to a third State if Article 54 of the CISA were applicable in the present case?

53. In my view, it would.

**(b) *Ne bis in idem as a bar to extradition (or arrest in view of extradition)***

54. There is a clear connection between the principle *ne bis in idem* and the right to the free movement of persons set out in Article 21 TFEU. The Court has consistently held that ‘Article 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States *on account of the fact that he exercises his right to freedom of movement ...* It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. *They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State*’. (18)

55. To me, the application of such statements to potential requests for extradition from third States is uncompromisingly simple. The logic must be one of acting as ‘a block’. A decision barring any further prosecution for the same act in one Member State must have the same effects elsewhere within one and the same area of freedom, security and justice, in the same way that it would have within one and the same domestic legal system.

56. Moreover, if one such area exists internally, that must also have consequences externally. Thus, a Member State cannot arrest, temporarily detain or adopt any other measure limiting the freedom of movement of a person targeted by a red notice issued by Interpol if it has been authoritatively established that the trial of that person for the same acts has been finally disposed of in another Member State. Any such measure would go against Article 54 of the CISA by significantly restricting the right conferred by Article 21 TFEU. One legal space means one legal space, internally as well as externally.

57. However, some governments who submitted observations in the present proceedings disagree with such a conclusion, raising three objections to such a proposition. First, they consider such a conclusion to be based on an excessively broad reading of Article 54 of the CISA. In their view, that provision has a narrower scope, capturing only prosecution carried out by a Member State itself, but not arrest in view of extradition enabling subsequent prosecution in a third country (1). Next, they argue that such an interpretation would amount to an extra-territorial application of the Schengen Agreement (2), thereby creating friction with the Member States’ as well as the Union’s international law obligations assumed under bilateral extradition agreements, in particular those concluded with the United States (3).

58. In the following sections, I shall address those arguments in turn.

**(1) *The concept of ‘prosecution’***

59. First, some of the governments that submitted observations argue that, whereas the principle *ne bis in idem* precludes a person from being ‘*prosecuted*’, it does not preclude a person from being subject to

measures such as those identified in the order for reference. In their view, those measures should not be regarded as constituting ‘prosecution’, but as ‘precautionary measures’ aimed at assisting another State where prosecution will take place.

60. Such an interpretation of Article 54 of the CISA appears somewhat formalistic. I fail to see any textual, contextual or teleological element that supports the view that the concept of ‘prosecution’ encompasses only criminal procedures that take place ‘from birth to death’ in one and the same State, and must be all carried out by that State.

61. The wording of Article 54 of the CISA does not require that the subsequent prosecution, which is barred, must be carried out *by* another Contracting Party. It prevents any prosecution *in* another Contracting Party, thus textually accommodating the prohibition of any territorial participation in acts of prosecution carried out in that Member State on behalf of other States.

62. Next, there is no doubt that measures such as arrest or temporary detention – in addition to meeting, *prima facie*, the so-called ‘*Engel* criteria’ ([19](#)) in order to be considered of a ‘criminal nature’ – enable the prosecution of the requested person to take place in a third State. In other words, those measures form part of a *continuum* of acts, possibly adopted in different States, through which the requested person is subjected to legal proceedings in respect of a criminal charge.

63. An EU Member State implementing the red notice acts as a *longa manus* of the prosecuting State. That Member State effectively acts for and on behalf of the prosecution of another State, potentially making it possible to subject the requested person to the (prosecutorial) power of a third country. To suggest, in such circumstances, that such an act is not part of the (typically already ongoing) prosecution by a third country would be like maintaining, if I may be excused for using such a sinister but still pertinent substantive criminal law analogy, that tying a person up and handing that person over to be stabbed by a third party does not constitute (either accessory to or the joint act of) murder, but just a ‘precautionary measure’ aimed at assisting the other person holding the knife.

64. At the level of purpose, in so far as Article 54 of the CISA is intended, *inter alia*, to protect EU citizens’ freedom of movement, ([20](#)) any other interpretation would hardly be compatible with that objective, as well as the fundamental rights context in which that provision, together with Article 50 of the Charter, operate. A person who is subject to arrest or temporary detention, with a view to his or her extradition, despite being entitled to benefit from the principle *ne bis in idem*, is not – borrowing the language used by the Court – ‘left undisturbed’ or ‘able to move freely’ within the Union.

65. That is also borne out by the Court’s interpretation of that principle, as enshrined in Article 50 of the Charter. In relation to that provision, the Court has consistently held that ‘the [principle *ne bis in idem*] prohibits a duplication *both* of *proceedings* and of *penalties* of a criminal nature for the purposes of that article for the same acts and against the same person’. ([21](#)) Accordingly, the mere carrying out of procedural acts relating to the criminal prosecution of an individual is also prohibited under Article 54 of the CISA.

## (2) *An ‘extra-Schengen’ application*

66. Second, some governments suggest that Article 54 of the CISA applies only ‘within Schengen’ and does not govern situations in which a person has been tried or may be tried in a third State. In other words, Article 54 of the CISA would bind the Contracting Parties only in their mutual relationships, but not in their relationships with third States (which are governed by national and international law). That position would be further corroborated by the fact that the European Union – United States Extradition Agreement ([22](#)) does not provide for an absolute ground for refusal in cases where the principle *ne bis in idem* is applicable. Failing any express provision in that regard, the subject matter falls within the competence of the Member States, which should thus be free to regulate it as they see fit, in particular by means of bilateral agreements.

67. I cannot but agree with a number of individual propositions contained in those arguments. However, I certainly do not agree with their combination and the conclusion reached on their basis.

68. To begin with, it is indeed true that the Schengen Agreement does not apply to third countries. But it certainly applies to the actions taken by its Contracting Parties, on their own territories, on behalf of third States. For the rest, the argument largely overlaps with that set out in the previous section: the fact of not being prosecuted twice *in another Member State* is broader than that of not being prosecuted *in and by* that Member State. That covers, on a textual as well as a systemic and a logical level, enabling acts for prosecution of a third party being carried out in a Contracting Party.

69. That conclusion is further corroborated by an interpretation of Article 54 of the CISA in the light of the Charter. Article 50 thereof elevates the principle *ne bis in idem* to a fundamental right, providing that ‘*no one* shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’. (23) Arguably, ‘*no one*’ must mean ‘*no one*’, without any territorial limitations at all, and not ‘*no one except individuals subject to prosecution outside the Union*’.

70. After all, it would be a rather odd reading of Article 50 of the Charter if the importance and the reach of this fundamental right were to stop, for the Member States’ authorities, at the external border of the Union. Not only would that be dangerous for the effective protection of fundamental rights as it invites circumvention, but it would also make little sense in view of the Member States’ sovereignty and their *ius puniendi*: if the principle *ne bis in idem* is sufficient to prevent a Member State from exercising its criminal competence directly (that is, by prosecuting a person themselves), how could it not be enough to prevent the same Member State from acting on behalf of the criminal competence of a third State? Why should the *ius puniendi* of third States be protected more strongly than that of Member States?

71. In that connection, it must be recalled that, in *Petrushhin* (24) and in *Pisciotti*, (25) the Court found that the situation of a Union citizen who is the subject of requests for extradition from a third State, and who has made use of his or her right to move freely within the European Union, comes within the scope of Article 21 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter. The same logic must be valid with regard to a Union citizen who is actually and genuinely *seeking* to make use of that freedom. (26) Thus, if the obstacle to the applicant’s freedom of movement brings his situation within the scope of the Charter, the right enshrined in Article 50 thereof must also be applicable to that situation.

72. In particular, the situation of the applicant who is unable to move from Germany to other EU Member States due to the risk of being arrested and, possibly, subsequently extradited to a third State, is similar to that already examined by the Court in *Schöttöfer*. (27) In that case, extradition to a third State (the United Arab Emirates), was precluded as the person in question risked the death penalty. In the present case, an arrest or similar measure, with the view to subsequent extradition to a third State (the United States), should arguably be precluded because of the principle *ne bis in idem*.

73. Finally, I would merely add that Article 50 is not the only provision of the Charter that is relevant in a case such as that at issue. In particular, a restrictive reading of Article 54 of the CISA could also create issues, *inter alia*, under Article 6 (liberty and security) and Article 45 (freedom of movement) of the Charter. Those provisions, although not mentioned by the referring court, appear equally relevant in the present case. To my mind, it is not obvious that the interference with the rights enshrined in those provisions, brought about by restrictive measures adopted to implement a red notice, could be considered to meet the requirements of Article 52(1) of the Charter when the person in question has, for example, already been acquitted of certain criminal charges or has fully served the sentence issued against him or her.

### (3) *The Union’s and the Member States’ bilateral international law obligations*

74. Third, I recognise that the argument put forward by some interveners based on the fact that the principle *ne bis in idem* does not constitute an absolute ground for refusal under the EU-US Agreement

has, at least at first sight, a certain force. It is not unreasonable to argue that, had the EU legislature intended to give the principle *ne bis in idem* an ‘extra-Schengen’ scope, an ad hoc ground for refusal should have, possibly, been included in the agreement.

75. However, upon closer inspection, that argument is by no means determinative. At the outset, there is hardly the need to point out that there may be various reasons for the absence of a specific provision on the matter, including the unwillingness of the US authorities to accept it. (28) More importantly, attention must be drawn to Article 17(2) of the EU-US Agreement, according to which ‘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, 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’.

76. That provision implies that the Contracting Parties acknowledge the possibility that, within their respective legal orders, some constitutional principles or final judicial decisions may ‘constitute an impediment to fulfilment of [their] obligation to extradite’, despite not having been agreed by the parties as giving rise to an absolute ground for refusal. (29) The mere fact that any such principle or decision does not automatically prohibit extradition, but requires the authorities to trigger the consultation procedure set out in the agreement, does not detract from the existence (and binding nature) of the legal impediment.

77. Nor it is relevant, in this context and as raised by a number of governments, that since the EU-US Agreement does not regulate extradition in situations where the principle *ne bis in idem* may be applicable, that subject matter is, as the law currently stands, governed by national law only. In this context, the German Government further maintained that a broad reading of Article 54 of the CISA would have negative consequences on relations between EU Member States and third States because it could make it more difficult, if not impossible, for them to comply with international agreements to which they are parties (and, by implication, with the principle *pacta sunt servanda*).

78. It is true that, in the absence of EU regulation on the matter, the rules on extradition fall within the competence of the Member States. (30) However, in situations covered by EU law, the national rules concerned must be applied in accordance with EU law, and in particular with the freedoms guaranteed by Article 21 TFEU. (31)

79. As far back as in 1981, the Court held that ‘criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However ... that Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons’. (32) That must a fortiori be true some 40 years later, when the Member States have made a commitment to offer their citizens ‘an area of freedom, security and justice [(‘AFSJ’)] without internal frontiers, in which the free movement of persons is ensured’. (33)

80. Accordingly, EU Member States indeed remain free to govern the matter and, in that context, enter into bilateral (or multilateral) agreements with third States. However, that is legitimate only in so far as they do not agree to any commitment which is incompatible with the obligations stemming from EU law. In principle, even in areas subject to national competence, and outside the specific context of Article 351 TFEU, Member States cannot circumvent or derogate from their EU law obligations by means of agreements concluded with third countries. That would, as a matter of principle, call into question the principle of primacy of EU law. (34)

81. Those considerations are of particular importance in the present case, which concerns a right laid down in the Charter. The Court has consistently stated that the European Union is to respect international law in the exercise of its powers and that measures adopted by virtue of those powers must be interpreted, and – where appropriate – their scope limited, in the light of the relevant rules of international law. (35) However, the Court has also made clear that that precedence of international law over provisions of EU law does not extend to EU primary law, and in particular to the general principles of EU law of which

fundamental rights form part. (36) Accordingly, neither the Union, nor the Member States (provided they act within the scope of the EU Treaties), could justify a possible breach of fundamental rights by their duty to comply with one or more international treaties or instruments.

82. In any event, the argument according to which the interpretation of Article 54 of the CISA proposed here would make it difficult, if not impossible, for the Member States to comply with the principle *pacta sunt servanda* does not appear to be correct, at least as far as the Interpol Convention is concerned. A red notice issued by Interpol does not require its members to, under all circumstances, arrest or adopt measures restricting the requested person's movements. They must inform Interpol and the requesting State when a requested person is located in their territory, but any other measure, including those restricting the free movement of that person, must be adopted, in accordance with Article 87 of the IRDP, only in so far as it is 'permitted under national law and applicable international treaties'. (37) In fact, that provision also refers to the 'monitoring' of the requested person, as a possible alternative to measures restricting that person's movement. Furthermore, as mentioned in point 27 above, a red notice by no means requires a State to extradite the person that is the subject of a red notice. A specific request, not governed by Interpol's rules, is necessary to that end.

83. Accordingly, I am of the view that Article 54 of the CISA may be applicable to situations where a person has been tried or may be tried in a third State. Provided that the applicability of the principle *ne bis in idem* has been authoritatively established at a horizontal level, by one Member State, that principle will shield that person from extradition to any other Member State for the same act. It is in this dimension that the principle *ne bis in idem* and the principle of mutual recognition operate: a second (or third or even fourth) Member State will be obliged to recognise and accept the fact that the first Member State reviewed the extradition request, was satisfied that there indeed was identity between a previous conviction in the Union and the act(s) for which extradition is sought, and came to the conclusion that with regard to those acts, the principle *ne bis in idem* was triggered, and on that basis refused the request for extradition. (38)

84. Seen in this light, the assessment already made concerning the existence of the *ne bis in idem* obstacle to extradition by the first Member State seised of the request may be binding on all the other Member States seised by a subsequent extradition request vis-à-vis the same person. However, within this dimension, and contrary to a number of international law and policy arguments raised in this section by several interveners, there is (certainly no direct) restriction on any bilateral agreements or international law obligations of the Member States. Those may certainly be applied if the Member State is in fact the first state to deal with the matter. It is simply necessary to accept the decision on the same matter that has already been taken by another Member State within the Union. Once that decision 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).

## **2. When the actual application of the principle *ne bis in idem* has not been established in a specific case**

85. The Court has consistently stated that Article 54 of the CISA implies that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied. That mutual trust requires that the relevant competent authorities of the second Contracting State accept at face value a final decision communicated to them which has been given in the first Contracting State. (39)

86. However, the Court has made clear that that mutual trust can prosper only if the second Contracting State is in a position to satisfy itself, on the basis of the documents provided by the first Contracting State, that the decision of the competent authorities of that first State does indeed constitute a final decision including a determination as to the merits of the case. (40)

87. These principles are of particular importance in the present case. Indeed, it would appear from the case file, as supplemented by the helpful clarifications from the BKA and the German Government, that, to date, there has not been any final determination, let alone a *judicial* one, as to whether the charges for which Interpol issued the red notice against the applicant relate to the same acts for which his trial in Munich has been finally disposed of. There is thus no authoritative determination that the principle *ne bis in idem* is in fact applicable in the case of the applicant in the main proceedings.

88. As the BKA explained in its observations, in the case at hand there was no need for any such determination. In view of the nationality of the applicant, the BKA never took any measure to make the red notice operational on the territory of the Federal Republic of Germany. It is my understanding that, in the light of the prohibition of extradition of German citizens set out in Paragraph 2 of Article 16 of the Grundgesetz für die Bundesrepublik Deutschland of 23 May 1949 (Basic Law for the Federal Republic of Germany), as amended, this is the BKA's approach in all cases in which a red notice concerns a German citizen, who, in any case, could not be extradited to a State outside the Union, irrespective of the possible applicability of the principle *ne bis in idem*.

89. That explains why, in its second question, the referring court enquires as to whether Member States can implement a red notice when another Member State has notified Interpol, and thus also the other members of Interpol, of its '*concerns*' (in the original request for a preliminary ruling, '*Bedenken*') regarding the applicability of the principle *ne bis in idem*. The text of the *addendum* to the red notice published by Interpol in 2013 reflects that position. It reads: '[The National Central Bureau of] Wiesbaden *considers* that double jeopardy should apply as the charges, on which the red notice are based (*sic*), are identical to an offence for which Munich's public prosecutor's office took proceedings against the subject, which were terminated.' (41)

90. The fact that, apart from an 'e-sticker' inserted in the Interpol database by a national police officer, there has never been any final authoritative determination of either the identity of the acts or the application of *ne bis in idem* with regard to those acts, is also apparent from the chronology of events: the decision of the Public Prosecutor at issue dates from 2009; the red notice was published by Interpol in 2012; and the applicant brought an action before the referring court in 2017. There is no trace in the case file of any proceedings, in Germany or in any other EU Member State, (42) where the issue of the possible applicability of the principle *ne bis in idem* has arisen and was adjudicated upon.

91. Therefore, although – as explained above – Article 54 of the CISA appears, in the abstract, applicable to a situation such as that at issue in the main proceedings, the question of whether the two proceedings at issue relate to the same act has, apparently, not (yet) been determined, let alone *finally* determined, by the competent authorities of either Germany or any other EU Member State. Consequently, at least for the time being, there is no decision that other Member States, in the light of the principle of mutual trust, could and should recognise and accept as equivalent to their own decisions.

92. In those circumstances, it seems to me that there is nothing to prevent the Member States other than Germany from implementing a red notice issued by Interpol against the applicant. Mere *concerns* expressed by the police authorities of a Member concerning the applicability of the principle *ne bis in idem* cannot, for the purposes of Article 54 of the CISA, be equated to a final determination that that principle is indeed applicable.

93. I certainly acknowledge the uneasy situation of the applicant. However, the legal consequences outlined in the previous section and sought by the applicant can only be attached to an appropriate decision issued in that sense. There needs to be a balance between protection and impunity. The Court has already stated that Article 54 of the CISA 'is not intended to protect a suspect from having to submit to investigations that may be undertaken successively, in respect of the same acts, in several Contracting States'. (43) Indeed, that provision must be interpreted 'in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the [AFSJ]'. (44) In *Petrohhuin* and *Pisciotti*, the Court emphasised that the EU measures adopted in the AFSJ must reconcile the imperatives of the free movement of persons with the need to adopt appropriate

measures to prevent and combat crime. In particular, the EU measures must also aim to *prevent the risk of impunity* for persons who have committed an offence. (45)

94. Those considerations are mirrored in procedure. There is a specific provision in the CISA which envisages the situation in which doubts exist as to whether a person that may be prosecuted in a Contracting State may actually benefit from the principle *ne bis in idem* in that regard. Article 57 of the CISA states that ‘where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person’s trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered. The information requested shall be provided as soon as possible and shall be taken into consideration as regards further action to be taken in the proceedings under way’. That provision is a manifestation, in this context, of the principle of sincere cooperation enshrined in Article 4(3) TEU.

95. Therefore, if there are indications that the principle *ne bis in idem* may be applicable in relation to the charges for which Interpol has issued a red notice against a Union citizen, it is expected that the authorities of other Member States – should they locate the person in their territory – will, in the light of Article 57 of the CISA, (i) act promptly to have the situation clarified, and (ii) duly take into account the information provided by the other Member State. As mentioned in point 85 above, the Court has already made clear that Member States must have the possibility to satisfy themselves, on the basis of the documents provided by the Member State where the person has been tried, that the conditions for the application of the principle *ne bis in idem* are fulfilled.

96. So long as the competent Member State’s authorities have not been able to verify whether the principle *ne bis in idem* applies, they must obviously be permitted to implement the red notice and, where appropriate and necessary, restrain the requested person’s freedom of movement. Indeed, there is no basis in EU law that may prevent them from complying with their national rules in that matter or, as the case may be, with the international treaties that may be applicable. However, once that determination has been made by the competent authorities of a Member State, possibly confirming that the principle *ne bis in idem* has been validly triggered with regard to a given red notice, all the other Member States are bound by that particular final determination.

### **3. *Interim conclusion (and an internal analogy)***

97. In the light of the above, I take the view that Article 54 of the CISA, in conjunction with Article 50 of the Charter, and Article 21(1) TFEU, precludes the Member States from implementing a red notice issued by Interpol at a request of a third State, and thereby restricting the freedom of movement of a person, provided that there has been a final determination adopted by the competent authority of a Member State as to the actual application of the principle *ne bis in idem* in relation to the specific charges for which that notice was issued.

98. As a concluding footnote on that proposed answer, I note that such a solution would also be systematically consistent with EU internal instruments governing similar issues, such as Directive 2014/41/EU regarding the European Investigation Order (‘EIO’) in criminal matters, (46) or Framework Decision 2002/584/JHA on the European arrest warrant (‘EAW’). (47)

99. Pursuant to Article 11(1)(d) of Directive 2014/41, the principle *ne bis in idem* constitutes one of the grounds for non-recognition or non-execution of an EIO. It should not be overlooked, in this context, that EIOs may also be adopted *before* criminal proceedings are actually brought, (48) and likewise in proceedings which are not formally labelled as ‘criminal’ under national law. (49) Another instrument including provisions similar to those included in Directive 2014/41 is Framework Decision 2002/584. Those provisions show that Article 54 of the CISA cannot be interpreted narrowly: the principle *ne bis in idem* is not conceived, by the EU legislature, merely as a bar to having a citizen stand in a courtroom twice. There is clearly more to the issue. That principle must, at the very least, preclude measures that, whatever

their label under national law, severely restrict a person's freedoms (such as arrest or temporary detention) and the adoption of which is logically, functionally and chronologically related to criminal proceedings, even if in a third State. (50)

100. Second, those two instruments also confirm that, for the blocking effect of the principle *ne bis in idem* to arise, there must be a final determination as to the actual application of that principle in relation to the specific case. Indeed, a similar approach has been followed by the EU legislature with regard to the execution of an EIO. According to recital 17 of Directive 2014/41, Member States' authorities may refuse to execute an EIO when that would be contrary to the principle *ne bis in idem*. However, 'given the preliminary nature of the proceedings underlying an EIO, its execution should not be subject to refusal where it is aimed to establish whether a possible conflict with the [principle] *ne bis in idem* exists'. (51) Obviously, an EIO is less restrictive than a measure limiting a citizen's freedom of movement but, arguably, the underlying principle seems transposable to the situations governed by Articles 54 and 57 of the CISA. Likewise, according to Article 3(2) of Framework Decision 2002/584, the application of the principle *ne bis in idem* constitutes one of the grounds for mandatory non-execution of the EAW. However, as long as the executing judicial authority has not taken a decision on the execution of the EAW, including on the possible application of Article 3(2) of the framework decision, the person concerned may, pursuant to Articles 11 and 12 thereof, be arrested and maintained in detention. (52)

#### **4. Fourth and sixth questions**

101. By its fourth and sixth questions, which can be examined together, the national court seeks essentially to ascertain whether the provisions of Directive 2016/680, read in conjunction with Article 54 of the CISA and Article 50 of the Charter, preclude the further processing of personal data contained in a red notice issued by Interpol, where the principle *ne bis in idem* applies to the charges for which the notice was issued.

102. In fact, the referring court seeks clarification of whether, in circumstances such as those at issue in the present case, once the application of the principle *ne bis in idem* is established, Member States should be required to erase the personal data of the requested person contained in the red notice and refrain from any further processing of those data. It refers, in that regard, to Article 4(1), Article 7(3), Article 8(1) and Article 16 of Directive 2016/680.

103. At the outset, I would first like to note that, for the reasons explained in points 85 to 92 above, it is not clear whether the principle *ne bis in idem* is actually applicable in the case at hand. No such authoritative determination appears to have been made in the present case. Viewed from that standpoint, it could indeed be argued that the subsequent issue, starting from the assumption that the principle *ne bis in idem* is indeed applicable, and what that would mean for data processing, is at this stage hypothetical. However, if that principle were applicable, my proposed answer to the referring court would be the following.

104. To begin with, a case such as that at issue in the main proceedings falls within the scope of Directive 2016/680 as set out in Article 1(1) thereof. The processing of personal data contained in red notices issued by Interpol by the authorities of the Member States concerns an identifiable natural person (the requested person) and is aimed at the prosecution of that person for criminal offences, or for the execution of criminal penalties (given the purpose of red notices under Article 82 of the IPRD).

105. In accordance with Article 4(1) of Directive 2016/680, Member States must, inter alia, ensure that personal data are 'processed lawfully and fairly' (point a), 'collected for ... legitimate purposes and not processed in a manner that is incompatible with those purposes' (point b), and 'accurate and, where necessary, kept up to date' (point d). In turn, Article 8(1) of the directive states that 'Member States shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) and that it is based on Union or Member State law'.

106. It is common ground that the conditions set out in Article 8(1) of Directive 2016/680 are generally satisfied when Member States' authorities process the personal data included in a red notice with a view to its execution. It is equally undisputed that, in doing so, Member States' authorities are acting *on the basis of both EU and national law*. As recital 25 of the Directive 2016/680 makes clear 'all Member States are affiliated to [Interpol]. To fulfil its mission, Interpol receives, stores and circulates personal data to assist competent authorities in preventing and combating international crime. It is therefore appropriate to strengthen cooperation between the Union and Interpol by *promoting an efficient exchange of personal data* whilst ensuring respect for fundamental rights and freedoms regarding the automatic processing of personal data. Where personal data are transferred from the Union to Interpol, and to countries which have delegated members to Interpol, this Directive, in particular the provisions on international transfers, should apply'. (53)

107. In addition, it is also clear that the processing of data included in a red notice is *necessary* for the performance of a task carried out by a competent authority for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. The arrangements concerning the colour-coded notices, set up by Interpol, constitute one of the pillars of the system of mutual assistance between criminal police forces for which Interpol was created. In so far as they allow for a more rapid and effective localisation and, possibly, prosecution of fugitives, red notices contribute significantly towards the Union's objective of offering its citizens an AFSJ in which appropriate measures, with respect to the prevention and combating of crimes, are adopted.

108. Therefore, there can hardly be any doubt that the processing, by the Member States' (or, for that matter, the European Union's) authorities, of personal data contained in a red notice issued by Interpol is, in principle, lawful.

109. That said, the key issue raised by the referring court is whether that remains true even if it were to be established that a red notice issued against an individual concerns acts for which, within the Union, he or she benefits from the principle *ne bis in idem*. More specifically, in such a case, does Directive 2016/680 (i) require the Member States' authorities to erase the personal data of the individual, and (ii) preclude any further processing of personal data by those Member States' authorities?

110. In my view, the answer to both questions must be in the negative.

111. In the first place, it is true that Article 7(3) of Directive 2016/680 provides that, if it emerges that incorrect personal data have been transmitted or personal data have been unlawfully transmitted, the recipient is to be notified without delay. In such a case, the personal data must be rectified or *erased* or the processing thereof restricted, in accordance with Article 16 of that directive.

112. However, in contrast to what is implied by the referring court, the fact that an individual may benefit from the principle *ne bis in idem* in relation to the charges for which a red notice was issued does not mean that the data contained in that notice were unlawfully transmitted. The principle *ne bis in idem* cannot call into question the veracity and accuracy of data such as, for example, the personal information, the fact that that person is wanted in a third State for having been accused or found guilty of certain crimes, and that an arrest warrant has been issued against him or her in that State. Nor was the initial transmission of that data unlawful, for the reasons explained above.

113. Therefore, the application of the principle *ne bis in idem* does not entail, for the person concerned, the right, pursuant to Article 16 of Directive 2016/680, to request that his or her personal data be erased.

114. In the second place, it cannot reasonably be argued that, if the principle *ne bis in idem* were applicable, *any* further processing of the personal data must be precluded.

115. Article 3(2) of the directive defines 'processing' very broadly as 'any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation,

use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction'. The arguments put forward by the applicant – and which the referring court seems to sympathise with – would imply that, from the moment it is established that the principle *ne bis in idem* is applicable, none of those operations (with the exception of erasure) would be possible.

116. Nevertheless, I find no basis for that conclusion in Directive 2016/680. Potential ‘unlawful prosecution’ cannot be simply equated with ‘unlawful data processing’ under Directive 2016/680. Nothing in the text, and certainly not in the system and purpose, of that directive allows for the logic underlying Article 54 of the CISA to be transplanted into the system of data protection set up by Directive 2016/680, and for the referring court to start deciding on the lawfulness of processing on that basis. Those instruments have a different rationale and pursue a different objective, thereby creating a different type of legal framework.

117. The opposite of what the referring court suggests in that regard appears in fact to be the case: it follows from the provisions of that directive that further processing of personal data is not only lawful but, in the light of the purpose of the processing, even required.

118. Some processing operations may indeed be necessary – and thus permitted under Article 4(1) of Directive 2016/680 – to ensure that the task for which they were collected (in order to implement the red notice) is carried out, *inter alia*, ‘lawfully and fairly’.

119. As the Commission, as well as a number of governments, point out, some further processing of the data (such as consultation, adaptation, disclosure and dissemination) may be required to avoid a situation in which the person against whom the red notice was issued is wrongly subject to criminal measures in Member States or, if such measures have been adopted, to ensure a rapid lifting of those measures.

120. Similarly, some adaptation and storage of the data may be necessary to avoid a situation in which a person is, in the future, subject (again) to possible unlawful measures for acts covered by the principle *ne bis in idem*. For example, as mentioned in point 38 above, in the case at hand it cannot be excluded that the United States may in the future ask Interpol to re-issue a red notice for the same acts. I would add that, in the case of some crimes, it is also not unthinkable that a red notice for the same acts may be issued at the request of several States.

121. Therefore, it is the very application of the principle *ne bis in idem* in a specific case that may render necessary further processing of the personal data contained in the red notice. It should be pointed out that further processing is carried out not only in the interest of the Member States’ authorities, but also, or perhaps even especially, in the interest of the person who is the subject of the red notice. Were it to be otherwise, and all the data had to be erased immediately once *ne bis in idem* was triggered, the consequences could be rather odd: the legally imposed memory span of the national police authorities would become like that of Dory the fish (still *Finding Nemo* (54)) so that the requested person would end up being forced, in a rather unfortunate rerun of Bill Murray’s *Groundhog Day*, (55) to invoke and prove the protection under the principle *ne bis in idem*, with regard to the criminal charges in question, over and over again.

122. Moreover, some further data processing may also be permitted under Article 4(2) of Directive 2016/680, a provision that is not mentioned in the order for reference. That provision allows, under certain circumstances, processing of personal data ‘for any of the purposes set out in Article 1(1) other than that for which the personal data are collected’. (56) This means that the data collected in order to implement the red notice may also be processed (for instance, organised, stored and archived), subject to the fulfilment of certain conditions, where necessary to pursue *other purposes* allowed under the directive. (57)

123. Therefore, both the text and the logic of Directive 2016/680 do not support an interpretation according to which any further processing is per se prohibited. However, such further processing of personal data must, obviously, still be carried out in accordance with the requirements of Directive 2016/680, which remain fully applicable to the situation.

124. In particular, I agree with the German and United Kingdom Governments that it is crucial to determine whether the further processing may, in view of the specific circumstances, be considered ‘necessary’ for the purposes of Article 4 and Article 8(1) of Directive 2016/680. Simply put, this raises the question whether a given processing operation may be required in the light of the fact that the person benefits from the principle *ne bis in idem*.

125. For example, the continued storage of the data with the indication that the person cannot be prosecuted for those acts because of the principle *ne bis in idem* may probably be considered to be ‘necessary’, whereas a further spreading of the information to the police forces that that person is wanted on the basis of a red notice may not be so. Clearly, such an assessment can be carried out only on a case-by-case basis, in the light of all relevant circumstances.

126. In that context, it may be worth pointing out that, under Article 4(4) of Directive 2016/680, the controller must demonstrate compliance with the necessity criterion. Also, it should be recalled that a data subject enjoys certain rights conferred to him or her by Articles 12 to 18 thereof.

127. For instance, I can imagine that the person against whom a red notice was issued could be recognised as having the right to ask the Member States’ authorities to complete or update, in their databases, the data contained in a red notice, adding an indication, where appropriate, that, within the Union, he or she has already been tried and acquitted or convicted for those acts. Indeed, pursuant to Article 4(1)(d) of Directive 2016/680, Member States must provide for personal data to be, *inter alia*, ‘accurate and, where necessary, kept up to date’. To that end, Article 16(1) of Directive 2016/680 gives data subjects, *inter alia*, ‘the right to have incomplete personal data completed’. However, it must be noted that, in the context of the present case, such a scenario is as yet somewhat hypothetical, taking into account the fact that the applicability of the principle *ne bis in idem* to the situation of the applicant does not appear to have been established by any competent authority of a Member State.

128. In the light of the above, I take the view that the provisions of Directive 2016/680, read in conjunction with Article 54 of the CISA and Article 50 of the Charter, do not preclude the further processing of personal data contained in a red notice issued by Interpol, even if the principle *ne bis in idem* were to apply to charges for which the notice was issued, provided that the processing is carried out in accordance with the rules set out in that directive.

## **5. Fifth question**

129. By its fifth question, the referring court asks whether an international organisation, such as Interpol, has an adequate level of data protection for the purposes of Directive 2016/680 if there is no adequacy decision under Article 36 of that directive and/or there are no appropriate safeguards under Article 37 of that directive.

130. The answer to that question, given its formulation, would be rather straightforward. The provisions of Directive 2016/680 are clear on that account: an international organisation does not have an adequate level of data protection for the purposes of Directive 2016/680 *if* there is neither an adequacy decision under Article 36 thereof, nor appropriate safeguards within the meaning of Article 37 thereof, *unless* one of the exceptions set out in Article 38 thereof applies.

131. Nevertheless, I suspect that such an abstract and generic answer, which does no more than direct the referring court to the relationship between the various provisions of Chapter V of Directive 2016/680, is not one the referring court is looking for.

132. That impression is confirmed by the order for reference. The referring court states that if Interpol, in a situation such as that at issue in the main proceedings, does not ensure that the personal data contained in a red notice are duly erased or corrected, because of the applicability of the principle *ne bis in idem*, doubts may arise regarding the adequacy of Interpol’s data protection rules under Directive 2016/680. That would

ultimately lead to the question – in the view of the referring court – of whether Member States should refrain from cooperating with Interpol.

133. The referring court refers, in that regard, to recital 64 of Directive 2016/680, according to which ‘where personal data are transferred from the Union to controllers, to processors or to other recipients in third countries or international organisations, the level of protection of natural persons provided for in the Union … should not be undermined’. The reverse case of data transmission from a third country or an international organisation to the Member States of the Union is not expressly regulated in Directive 2016/680. However, according to the referring court, the same principles should apply.

134. These statements leave me somewhat perplexed. It appears that, by its fifth question, the referring court actually seeks to have the Court confirm its view that Interpol *does not* have an adequate level of data protection under Directive 2016/680, on the ground that there is no adequacy decision and there are no appropriate safeguards.

135. However, not only am I not convinced by the premiss on which such a question is based but, more importantly, I also fail to see why that question is raised at all in the context of the present proceedings.

136. First, the referring court is of the view that Directive 2016/680 contains a lacuna in so far as it does not regulate the (inbound) transfer of personal data from international organisations to the Union and the Member States. Yet, the existence of such a lacuna is, in my view, by no means obvious. The EU legislature regulated the transfer of personal data from the Union to third parties (be it an international organisation or a third State) in order to ensure that those data, once they leave the Union’s ‘virtual space’, continue to be treated according to equivalent standards. However, the situation relating to the transfer of personal data from a third party to the Union is naturally different. Once those data have entered the Union’s ‘virtual space’, any processing must comply with all the relevant EU rules. In those situations, there may, accordingly, be no need for rules such as those set out in Articles 36 to 38 of Directive 2016/680. The Union also has no interest (let alone the power) in requiring third parties to process personal data which do not originate from the Union according to rules equivalent to its own.

137. Second, and more importantly, I also fail to see how an answer to that question from the Court would be necessary for the referring court to give ruling in the case before it. The present case does not concern the transfer of data from EU Member States to Interpol but the reverse situation. The question that arises in the present case is, in essence, what the EU Member States may and may not do, under Directive 2016/680, when they *receive* data from Interpol relating to a person to whom the principle *ne bis in idem* may be applicable.

138. Therefore, any consequence that would flow from a (hypothetical) finding from the Court regarding the inadequacy of Interpol’s data protection rules would have no bearing on the specific situation of the applicant. This leads me to take the view, shared by many interveners that submitted observations in the present proceedings, that the fifth question is manifestly inadmissible.

## V. Conclusion

139. I propose that the Court answer the questions referred for a preliminary ruling by the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as follows:

- Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, and Article 21(1) TFEU, preclude the Member States from implementing a red notice issued by Interpol at a request of a third State, and thereby restricting the freedom of movement of a person, provided that there has been a

final determination adopted by a competent authority of a Member State as to the actual application of the principle *ne bis in idem* in relation to the specific charges for which that notice was issued.

- The provisions of Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, read in conjunction with Article 54 of the CISA and Article 50 of the Charter of Fundamental Rights, do not preclude the further processing of personal data contained in a red notice issued by Interpol, even if the principle *ne bis in idem* were to apply to charges for which the notice was issued, provided that the processing is effected in accordance with the rules set out in that directive.
- The fifth question is inadmissible.

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[1](#) Original language: English.

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[2](#) OJ 2000 L 239, p. 19.

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[3](#) OJ 2016 L 119, p. 89. Footnotes in the provisions of the directive have been omitted.

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[4](#) BGBl. I, p. 1354.

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[5](#) See, to that effect, judgment of 19 October 2004, *Zhu and Chen* (C-200/02, EU:C:2004:639, paragraph 31).

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[6](#) Recently, with further references, see Opinion of Advocate General Hogan in *Generalstaatsanwaltschaft Berlin* (C-398/19, EU:C:2020:748, points 73 to 76).

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[7](#) See, to that effect, judgment of 26 February 1991, *Antonissen* (C-292/89, EU:C:1991:80, paragraphs 8 to 14), and order of 6 September 2017, *Peter Schotthöfer & Florian Steiner* (C-473/15, EU:C:2017:633, paragraphs 19 to 21).

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[8](#) By contrast to, for example, judgment of 29 May 1997, *Kremzow* (C-299/95, EU:C:1997:254, paragraph 16 and the case-law cited).

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[9](#) See, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową* (*Disciplinary regime for judges*) (C-558/18 and C-563/18, EU:C:2020:234, paragraph 43 and the case-law cited).

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[10](#) See, *inter alia*, judgment of 24 October 2019, *État belge* (C-35/19, EU:C:2019:894, paragraph 29 and the case-law cited).

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[11](#) See judgments of 11 March 1980, *Foglia* (104/79, EU:C:1980:73), and of 16 December 1981, *Foglia* (244/80, EU:C:1981:302).

12 Judgment of 11 February 2003 (C-187/01 and C-385/01, EU:C:2003:87, paragraph 48).

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13 Judgment of 5 June 2014 (C-398/12, EU:C:2014:1057, paragraph 31).

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14 Judgment of 27 May 2014 (C-129/14 PPU, EU:C:2014:586, paragraphs 63 and 64).

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15 Judgment of 10 March 2005 (C-469/03, EU:C:2005:156, paragraphs 34 and 35).

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16 Judgment of 22 December 2008 (C-491/07, EU:C:2008:768, paragraphs 40 and 45).

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17 Judgment of 29 June 2016 (C-486/14, EU:C:2016:483, paragraph 54).

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18 See judgment of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610, paragraph 27 and the case-law cited). Emphasis added.

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19 Judgment of the European Court of Human Rights ('the ECtHR') of 8 June 1976, *Engel and Others v. The Netherlands*, CE:ECHR:1976:0608JUD000510071, §§ 80 to 82). According to settled case-law of the ECtHR, the 'Engel criteria' must be used in order to determine whether or not there was a 'criminal charge' within the meaning of Article 4 ('Right not to be tried or punished twice') of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. See, inter alia, judgments of 10 February 2009, *Sergey Zolotukhin v. Russia*, CE:ECHR:2009:0210JUD001493903, § 53, and of 15 November 2016, *A and B v. Norway*, CE:ECHR:2016:1115JUD002413011, §§ 105 to 107.

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20 See above, point 54 of this Opinion.

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21 See, for example, judgment of 20 March 2018, *Menci* (C-524/15, EU:C:2018:197, paragraph 25 and the case-law cited). Emphasis added.

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22 Agreement on extradition between the European Union and the United States of America of 25 June 2003 (OJ 2003 L 181, p. 27) (the 'EU-US Agreement'). That agreement is not applicable to the case at hand.

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23 Emphasis added.

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24 Judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630).

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25 Judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222).

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26 See above, point 32 of this Opinion.

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27 See order of 6 September 2017, *Peter Schotthöfer & Florian Steiner* (C-473/15, EU:C:2017:633).

28 In this context, I note that a rather restrictive approach to the principle *ne bis in idem* seems to transpire from one of the understandings attached to the United States' ratification of the International Convention on Civil and Political Rights in 1992: 'the United States understands the prohibition upon double jeopardy in paragraph 7 [of Article 14] to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause'.

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29 See, with regard to that provision, judgment of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraphs 39 to 41).

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30 See, to that effect, judgment of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraph 26).

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31 See, to that effect, judgments of 13 November 2018, *Raugevicius* (C-247/17, EU:C:2018:898, paragraph 45), and of 2 April 2020, *I.N.* (C-897/19 PPU, EU:C:2020:262, paragraph 48).

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32 Judgment of 11 November 1981, *Casati* (203/80, EU:C:1981:261, paragraph 27).

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33 Article 3(2) TEU.

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34 See, *inter alia*, to that effect, judgment of 21 January 2010, *Commission v Germany* (C-546/07, EU:C:2010:25, paragraph 42).

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35 See, to that effect, judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 291 and the case-law cited).

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36 Ibid., paragraphs 307 and 308.

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37 That provision echoes Article 31 of Interpol's Constitution, according to which Interpol's members 'should do all within their power which is compatible with the legislations of their countries to participate diligently in its activities'.

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38 See also, in this sense, the recent order of Oberlandesgericht Frankfurt am Main (Higher Regional Court, Frankfurt am Main, Germany) of 19 May 2020, 2 AusIA 3/20, ECLI:DE:OLGHE:2020:0519.2AUSLA3.20.00 (also in *NStZ-RR* 2020, 288), in which that court lifted the national extradition arrest warrant (and refused extradition to the USA under a bilateral Germany – USA Agreement) for the reason that the requested person, an Italian national, had already been prosecuted for the same acts as those in the US extradition request in Italy, which in the view of the OLG Frankfurt triggered a *ne bis in idem* extradition prohibition also in other Member States, including Germany, preventing extradition by the latter Member State from under the bilateral agreement.

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39 See judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraphs 50 and 51 and the case-law cited).

40 Ibid., paragraph 52.

41 Emphasis added.

42 Such a determination could have been made, for example, by the judicial authorities of a Member State (other than his State of residence) in which the applicant would have been located. Depending on the circumstances, those authorities could have been called upon to issue, confirm, vary or lift the restrictive measures requested or imposed by the police authorities or the public prosecutor, as was, for example, the case in the factual scenario described above in footnote 38.

43 See judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 45 and the case-law cited). Emphasis added.

44 Ibid., paragraph 47.

45 Respectively, judgments of 6 September 2016, *Petruhhin* (C-182/15, EU:C:2016:630, paragraphs 36 and 37), and of 10 April 2018, *Pisciotti* (C-191/16, EU:C:2018:222, paragraph 47). Emphasis added.

46 Directive of the European Parliament and of the Council of 3 April 2014 (OJ 2014 L 130, p. 1).

47 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended.

48 See Article 4, under (a), of Directive 2014/41.

49 See Article 4, under (b) to (d), of Directive 2014/41.

50 In this dimension, again bringing to the fore the essentially a fortiori systemic argument made already above in point 70 of this Opinion: it would indeed be somewhat striking to arrive at the practical solution that in the AFSJ, within which criminal cooperation shall be facilitated, made easier and seamless, much stricter and limiting rules would in fact apply, whereas anything would be possible once a third State were to be involved.

51 Emphasis added.

52 Interestingly, in its judgment of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683, paragraph 40), the Court stated that, in view of their shared objective to ensure that a person is not prosecuted or tried more than once in respect of the same acts, Article 54 of the CISA and Article 3(2) of Framework Decision 2002/584 must be interpreted consistently.

53 Emphasis added. I understand that, in Germany, the execution of a red notice finds its basis, *inter alia*, in the provisions of the *Bundeskriminalamtgesetz* (the Federal Criminal Police Office Act).

54 *Finding Nemo* (2003), directed by Andrew Stanton and Lee Unkrich (Pixar and Walt Disney).

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55 *Groundhog Day* (1993), directed by Harold Ramis (Columbia Pictures).

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56 Emphasis added.

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57 Moreover, pursuant to Article 4(3) of Directive 2016/680, processing may also include ‘archiving in the public interest, scientific, statistical or historical use, for the purposes set out in Article 1(1), subject to appropriate safeguards for the rights and freedoms of data subjects’.