Op Ed: “Three (r)evolutions in a row: ne bis in idem , extradition agreements and the temporal scope of Article 351(1) TFEU: Generalstaatsanwaltschaft München v HF (C 435/22 PPU)”

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Op-Ed: "Three (r)evolutions in a row: *ne bis in idem*, extradition agreements and the temporal scope of Article 351(1) TFEU: *Generalstaatsanwaltschaft München v HF* (C-435/22 PPU)" by Stefano Montaldo

On 28 October 2022, the Grand Chamber of the Court of Justice issued the much-awaited preliminary ruling in *Generalstaatsanwaltschaft München v HF* (C-435/22 PPU). The ruling addresses three key issues. Firstly, the Court of Justice clarifies that the protection granted by the *ne bis in idem* principle applies regardless of the nationality of the person concerned. Therefore, it extends also to third country nationals who have been finally acquitted or convicted in a Member State. Secondly, the same principle prevents the authorities of a Member State from extraditing a person to a requesting third country. Thirdly, the ruling clarifies for the first time the temporal scope of application of Article 351(1) TFEU. The Court of Justice upholds a literal interpretation of this provision, according to which it covers only the international treaties concluded by the Member States before 1 January 1958 or before their accession to the Union.

The personal scope of application of the *ne bis in idem principle*

The referring court was adjudicating on whether to grant an extradition request made to Germany by the US authorities in relation to a Serbian national.

It was irrelevant that the person in question is Serbian: the Court of Justice states that the personal scope of application of Article 54 of the Convention Implementing the Schengen Agreement (CISA) and of Article 50 of the Charter is not dependent upon the nationality of the person concerned. Nor is the legality of his or her presence in the territory of a Member State relevant.

As I have argued in a comment to Advocate General Collins' Opinion in this case, the wording, the rationale, and the context of both provisions support this interpretative outcome. Yet, the question had been largely neglected by scholars and had never been addressed expressly by the Court of Justice itself. On the contrary, its traditional case-law connecting the *ne bis in idem* principle with preventing obstacles to the exercise of free movement fueled doubts (*Gözütok and Brugge*, para 36).

These clarifications constitute an important development towards reinforcing the protection granted by Article 54 CISA and Article 50 of the Charter throughout the Union. On the one hand, considerations of legal certainty and fairness overcome personal statuses and enhance individual rights in a borderless common judicial space (*Spasic*, para 77). On the other hand, strengthening the *ne bis in idem* principle implies taking mutual trust seriously, as this principle requires the national judicial authorities to recognise at face value judicial decisions

taken in other Member States, even in cases where domestic substantive or procedural law would have led to different outcomes.

The *ne bis in idem* principle and the obligations arising from extradition agreements concluded by the Member States

The second legal knot concerned whether a previous final sentence adopted in another Member State could amount to blocking the extradition of the wanted person from Germany to the US. The extradition request in question was covered by the bilateral US-Germany extradition agreement and by the complementary US-EU one. The former delimits the ban on extradition on grounds of *ne bis in idem* solely to final judicial decisions issued by an authority of the contracting parties (Article 8). The latter does not contain specific clauses, but Article 17(2) states that the national authorities are under a duty to consult constitutional principles or final decisions preventing the executing State from complying with its duty to extradite. It follows that a final decision handed down in another Member State at first sight does not affect the duty to extradite.

However, the Member States must exercise their competences in conformity with EU law. In particular, the German authorities have an obligation to recognise foreign final judicial decisions covered by the golden presumption of mutual trust. It follows that they need to treat such decisions as if they were national ones. Therefore, the US-Germany treaty is not compatible with the *ne bis in idem* principle and the German authorities need to interpret it in accordance with Article 54 CISA and Article 50 of the Charter. In case of an impossibility to bridge the incompatibility by interpretative means, the domestic authorities must set aside the relevant provisions of national law, as the Court of Justice has already confirmed that Article 50 of the Charter has direct effect (*Garlsson Real Estate*, paras 65-68).

Generalstaatsanwaltschaft München v HF adds a second brick to the wall of limits to extradition from the EU to third countries. In *Petruhhin* – where, however, no bilateral extradition treaty was applicable – the Court of Justice made clear that the authorities of a Member State must surrender a wanted person on the condition that there is no evidence of a risk of violation of Article 19(2) of the Charter. Yet, this stance reflected a generally acknowledged ground for refusing extradition, rooted in the prohibition of torture and inhuman and degrading treatment. Moreover, it concerned a purely bilateral relationship, where the requested authorities bore the responsibility of weighing the interests and rights at stake vis-à-vis the expectations of the requesting third country and the need to avoid impunity. *Generalstaatsanwaltschaft München v HF*, instead, extends the logic of mutual trust to the international obligations of the Member States. It follows that, from now on, third countries will face an EU-wide shield against extradition. In practice, this is groundbreaking. Firstly, while clauses on the principle of *ne bis in idem* between the contracting parties routinely feature in bilateral extradition agreements, to my knowledge not a single treaty signed by a Member State of the Union with a third country expressly refers to the European dimension of this principle. Therefore, pursuant to Article 351(2) TFEU, the Member States will have to take any available measure to align such treaties with EU law. Secondly, the direct effect of Article 50 of the Charter and the *Petruhhin* case lead to the consideration that the same outcome needs to be extended to cases of extradition requests issued in the absence of an *ad hoc* international legal basis. Thirdly, the potential of this mutual trust-logic for future expansions to other situations or rights should not be underestimated.

The temporal scope of application of Article 351(1) TFEU

The last (r)evolution brought by the case considered in this Op-Ed concerns the Court of Justice's first (and at the same time final) word on the temporal scope of application of Article 351(1) TFEU. This clause embodies a potential derogation to all the provisions of the Treaty. It follows that it must be interpreted as narrowly as possible. A strict reading reflects the will of the drafters of the Treaty, since the direct reference to 1 January 1958 was incorporated into the provision in question only on the occasion of the Treaty of Amsterdam coming into force. In the Court's view, this choice is an unambiguous demonstration of the clear intention to place a marked temporal dividing line to minimise incompatibilities between the international agreements concluded by the Member States and EU law.

The position taken by the Court of Justice disposes of the scholarly debate on the possibility of an extensive reading – where not of an interpretation by analogy – of Article 351(1) TFEU (Meesen, 485; Pantaleo, 307; Saluzzo, 309). Notwithstanding the straightforward wording of this provision, various commentators argued in favour of stretching its scope to the treaties concluded by the Member States after January 1958, but before the EU acquired power to legislate in the relevant subject matter. Such debate flourished in the aftermath of the entry into force of the Lisbon Treaty, when the introduction of a new exclusive EU power on foreign investments questioned the survival of the numerous bilateral investment treaties concluded by the Member States. Overall, the diversified argumentative patterns were based on the common denominator of paying due respect to national sovereignty and to the international obligations concluded in good faith by the Member States, especially where an expansion of the mandate of the EU was not predictable. Crucially, this reading by analogy was backed also by the Commission in its arguments before the Court in the case in question and a similar position had been put forward by the Council in various documents concerning the EU policy on international investments (Council Conclusions on a comprehensive European international investment policy, para 9). The two interpretative options had also been addressed – although occasionally – by Advocate General Capotorti and Advocate General Kokott, in support of a restrictive (by the former) and an extensive reading (by the latter).

The road taken by the Court of Justice is of a particular significance for some EU policy domains such as the Area of Freedom, Security and Justice, in which the number of international agreements concluded by the Member States is high and the EU has been endowed with express and increasingly extensive powers by virtue of the treaty reforms that have occurred over the last two decades. Therefore, *Generalstaatsanwaltschaft München v HF* is likely to impact the future evolution of a plethora of agreements concerning extradition and mutual legal assistance, but also migration law, such as in the case of readmission agreements.

Generalstaatsanwaltschaft München v HF shields the individual and the systemic dimensions of the Area of Freedom, Security and Justice. On the one hand, the Court of Justice takes the opportunity to discard the idea that the protection granted by the *ne bis in idem* principle should be declassified to a flanking measure to free movement. On the other hand, it reinforces the implications of mutual trust. Insofar as this principle applies, the duty to recognise a judicial decision handed down in another Member State can be opposed concerning a third country, and amounts to lifting the international obligations – such as an obligation to extradite – incumbent upon the Member States. Mutual trust preserves the EU standard of protection of fundamental rights vis-à-vis the outer world and requires the Member States to align their international obligations accordingly.

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