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This is a pre print version of the following article:

Original Citation:

Availability:

This version is available http://hdl.handle.net/2318/1878965 since 2022-11-08T10:09:27Z

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11 March 2025

28TH OCTOBER 2022
ISSN 2695-9585
EMPLOYMENT & IMMIGRATION HUMAN RIGHTS JUSTICE & LITIGATION

Op-Ed: "No one means no one: *ne bis in idem* and extradition agreements (Advocate General Collins' Opinion in *Generalstaatsanwaltschaft München v HF*)"

by Stefano Montaldo

On 13 October 2022 Advocate General Collins delivered his Opinion in *Generalstaatsanwaltschaft München v HF* (C-435/22 PPU). The case is a promising one, as it may lead to key clarifications with respect to two questions: the subjective scope of application of the principle of *ne bis in idem* established in Article 54 of the Convention Implementing the Schengen Agreement (CISA) and Article 50 of the Charter, and the interplay between this principle and the national authorities' obligations laid down in bilateral extradition agreements concluded by the Member States with third countries.

Factual background and preliminary question

The case stems from an extradition request filed by the US to Germany, in the framework of the US-EU and US-Germany extradition agreements. Before the German authorities, the wanted person –a Serbian national– complained that the request concerned the same acts in relation to which he had already been given a final sentence for in Slovenia in 2012. The Slovenian authorities provided evidence of this judicial decision and confirmed that Mr HF had served it in its entirety.

The Munich High Court asked if the *ne bis in idem* principle prevents the authorities of a Member State from extraditing a third country national, even at the expense of the obligations provided in an agreement concluded with a third country.

Advocate General Collins' reasoning

Advocate General Collins acknowledges that the freedom of movement of EU citizens is a founding rationale of the principle of *ne bis in idem*. According to settled case-law, EU citizens would be discouraged from exercising this right if they were at risk of a duplication of prosecution or sanctions in another Member State (*Gözütok and Brugge*, para 36). However, Article 54 CISA and Article 50 of the Charter also perform the more systemic task of shielding legal certainty and mutual trust (*Spasic*, para 77). These considerations led the Advocate General to find that the subjective scope of application of *ne bis in idem* should not be confined to EU citizens. The protection extends to other categories of third country nationals that benefit from tailor-made free movement rights, pursuant to EU secondary law (Articles 77(2)(c) and 79(2)(b) TFEU and Article 45(2) Charter). In the case at issue, the wanted person's State of origin features in the list of visa-free third countries. This means that, by virtue of a combined reading of Article 20(1) CISA and Article 6(1) of the Schengen Borders Code, he enjoys the right to move freely in the Schengen Area for a maximum period of 90 days during the 180 days following the date of first entry.

According to the Advocate General, refusing to surrender the person in question would not necessarily entail a departure from the international obligations arising from the US-Germany extradition agreement. On the one hand, admittedly, the *ne bis in idem* principle does not feature in the US-EU and the US-Germany treaties as an express ground for refusing extradition. On the other hand, Article 17(2) of the former agreement clarifies that the Contracting Parties must consult each other in case a constitutional principle would pose an impediment to the fulfillment of the requested State's obligation to extradite. In the Advocate General's view, the principle of EU law primacy and the duty to respect fundamental rights require the German authorities to trigger this clause and to refuse surrender.

In addition, Germany could not rely on Article 351(1) TFEU as a legal basis for prioritising the duty to extradite. Even though Article 351(1) TFEU refers to treaties concluded before 1958 or prior to a Member State's accession, the Advocate General shares the scholarly view that its scope

should extend to international agreements concluded before the EU would have been predictably conferred powers in the relevant subject matter (Meessen, 1976). Nonetheless, the Court of Justice made clear in *Kadi* (paras 304-308) that this clause does not amount to affecting the founding pillars of the Union, such as the protection of fundamental rights. Instead, in the Advocate General's view, pursuant to Article 351(2) TFEU, Germany would be under a duty to take all appropriate steps to bridge the gap between the bilateral extradition agreement with the US and the obligations stemming from EU law.

The personal scope of application of the *ne bis in idem* principle and the interplay with international obligations to extradite

The Advocate General's position on the *ne bis in idem* principle is understandably in line with the factual background to the case. However, it does not disclose in full the potential of the arguments backing it.

In my view, the principle in question should be detached from its free movement legacy and be extended to any cases falling under the scope of application of EU law, pursuant to Article 51(1) of the Charter. Some arguments based on the interpretative criteria most frequently used by the Court of Justice –textual, teleological, contextual– support this contention.

From a literal viewpoint, both Article 54 CISA and Article 50 of the Charter state that 'no one' shall be tried or punished twice, without further specifications whatsoever. As Advocate General Bobek pointed out in his Opinion in *WS-Red Notice Interpol*, 'no one must mean no one' (para 69). In addition, any element of Article 54 CISA narrowing down the scope of Article 50 of the Charter – such as a delimitation of its personal area of application– constitutes a restriction to a fundamental right, which can be justified only insofar as it complies with Article 52(1) of the Charter (*Spasic*, paras 54-55; *bpost*, paras 40-41; Explanations to Art. 50 of the Charter). A selective reading of 'no one' would simply not meet the requirement of being provided by law.

Similarly, it would hardly be genuinely functional to an objective of general interest recognised by the Union. The free movement rationale is only part of the *telos* of the *ne bis in idem* principle, which the Court of Justice has been using by way of routine, sometimes improperly (e.g. in *Spasic* the sentenced person was a Serbian national). Over the years, further systemic standalone considerations have gained momentum, namely legal certainty, equity and mutual trust (*Nordzucker*, para 62; *X*, para 54, where the Court draws a clear dividing line between sentences passed in a Member State and those imposed by third countries). Delimiting the personal scope of *ne bis in idem* would entail subjecting the obligation to accept at face value the decisions issued in other Member States deriving from mutual trust to the contingent and potentially variable legal status of the wanted person. This approach would unreasonably make

the intensity of the protection granted by the Charter conditional on external factors that have nothing to do with the substance of the right in question.

Lastly, the suggested interpretation would be in line with the context of the CISA and of *ne bis in idem* as such. On the one hand, Article 54 is framed in Title III CISA devoted to police and security, the provisions of which apply regardless of personal status. On the other hand, the Court has made clear that the various fragments the *ne bis in idem* principle is divided into under EU primary and secondary law should be interpreted consistently (*Mantello*, *bpost*). In this regard, relevant EU secondary acts do not make distinctions based on nationality and specialised legal regimes (e.g. Framework Decision 2002/584/JHA on the European Arrest Warrant) and have been interpreted accordingly thus far.

As per the international obligation of Germany to extradite, the case-law has consistently held that, even in the domain of extradition, the powers reserved to the Member States must be exercised in conformity with EU law (*Petruhhin*, para 26). In this framework, I am inclined to think that the Court will resort to Article 17(2) of the US-EU extradition agreement with a view to prioritising the duty to comply with EU law – either by urging a consistent interpretation of the treaties in question or by subjecting the obligation to extradite to the primacy of EU law. As the recent decision of some German courts to refuse surrender in similar situations involving EU citizens demonstrates (see a recent decision of the Oberlandesgericht Frankfurt), the reference to constitutional obstacles to extradition thereof grants room for maximising the role of the primacy of EU law and of the Charter. Moreover, the Court of Justice itself has already acknowledged that the Member States should refrain from extraditing a person who will likely face the risk of a violation of his or her fundamental rights in the requesting third country (*Petruhhin*, paras 51-60, in relation to Article 19 of the Charter).

These considerations allow the Court of Justice not to leave for a journey into the unknown, namely the interpretation of the temporal scope of application of Article 351(1) TFEU, between the rigorous time limit laid down in its text and an interpretation by analogy connected to the expansion of EU areas of intervention. Even though the latter option is widely credited among EU political institutions and has been supported by various scholars with convincing arguments (Pantaleo, 307; Saluzzo, 309), the Court of Justice has avoided all opportunities to take position on it, even in areas where it had been repeatedly encouraged to do so, such as foreign direct investments. Even though clarifications from the case-law would be welcome, this case is not an easy test bed. Firstly, it would be hard to identify a clear dividing line between an unpredictable expansion of EU policies, as the bilateral treaty in question was signed well before the communitarisation of the Schengen *acquis* but was later amended significantly twice. Secondly, bearing in mind the Court of Justice's stance in *Kadi*, the outcome of this demanding interpretative effort would likely not be worth the price, as extradition would be again limited on grounds of

constitutional obstacles covered by Article 17(2) of the US-EU agreement. In this respect, a third option could be available to the Court, namely pointing at an alleged incompatibility of this provision with EU primary law, rather than at the US-Germany agreement, insofar as it provides for a mere duty of consultation in the event of constitutional blocks to extradition.

Revolution ahead?

Be that as it may, the Court has an unprecedented opportunity to deploy the umbrella of protection of Article 54 CISA and Article 50 of the Charter in full, by shifting from the logic of free movement to that of the scope of application of EU law under Article 51(1). This interpretation of the personal scope of application of the *ne bis in idem* principle has the potential to cause remarkable cascade effects. It will urge the Member States to align the interpretation and implementation of the multitude of extradition agreements concluded with third countries to the protection of Article 50 of the Charter – where not to renegotiate them in case of a lack of other less demanding and workable options – as well as to carefully design the text of future treaties.

Link to the Op-Ed: https://eulawlive.com/op-ed-no-one-means-no-one-ne-bis-in-idem-and-extradition-agreements-advocate-general-collins-opinion-in-generalstaatsanwaltschaft-munchen-v-hf-by-stefano-montaldo/

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