ECLI:EU:C:2021:376

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

12 May 2021 (*)

(Reference for a preliminary ruling – Convention implementing the Schengen Agreement – Article 54 – Charter of Fundamental Rights of the European Union – Article 50 – Ne bis in idem principle – Article 21 TFEU – Freedom of movement of persons – Interpol red notice – Directive (EU) 2016/680 – Lawfulness of the processing of personal data contained in such a notice)

In Case C-505/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany), made by decision of 27 June 2019, received at the Court on 3 July 2019, in the proceedings

WS

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, A. Prechal, M. Ilešič, L. Bay Larsen, A. Kumin and N. Wahl, Presidents of Chambers, T. von Danwitz, F. Biltgen, P.G. Xuereb (Rapporteur), L.S. Rossi, I. Jarukaitis and N. Jääskinen, Judges,

Advocate General: M. Bobek,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 14 July 2020,

after considering the observations submitted on behalf of:

– WS, initially by S. Wolff and J. Adam, and subsequently by J. Adam and S. Schomburg, Rechtsanwälte,

– Bundesrepublik Deutschland, by M. Meyer, L. Wehle and A. Hansen, acting as Agents,

– the Belgian Government, initially by C. Van Lul, M. Van Regemorter, M. Jacobs, C. Pochet, J.-C. Halleux and P.-J. De Grave, and subsequently by M. Van Regemorter, M. Jacobs, C. Pochet, J.-C. Halleux and P.-J. De Grave, acting as Agents,

– the Czech Government, by T. Machovičová, M. Smolek and J. Vláčil, acting as Agents,

– the Danish Government, initially by J. Nymann-Lindegren, P.Z.L. Ngo and S. Wolff, and subsequently by J. Nymann-Lindegren and S. Wolff, acting as Agents,

– the German Government, by J. Möller and D. Klebs, acting as Agents,

– the Greek Government, by S. Charitaki, E.-M. Mamouna and A. Magrippi, acting as Agents,

– the Spanish Government, by L. Aguilera Ruiz, acting as Agent,

– the French Government, by A.-L. Desjonquères, A. Daniel, D. Dubois and T. Stehelin, acting as Agents,

– the Croatian Government, by G. Vidović Mesarek, acting as Agent,

– the Netherlands Government, by M.K. Bulterman and M.H.S. Gijzen, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Romanian Government, initially by C.-R. Canţăr, S.-A. Purza and E. Gane, and subsequently by E. Gane and S.-A. Purza, acting as Agents,

– the Finnish Government, by M. Pere, acting as Agent,

– the United Kingdom Government, by Z. Lavery, acting as Agent, and C. Knight, Barrister,

– the European Commission, by M. Wasmeier, D. Nardi and H. Kranenborg, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 November 2020,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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, signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995 (OJ 2000 L 239, p. 19; ‘the CISA’), of Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’), of Article 21 TFEU and 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 (OJ 2016 L 119, p. 89) and, in particular, Article 4(1)(a) and Article 8(1) of that directive.

2 The request has been made in proceedings between WS and Bundesrepublik Deutschland (the Federal Republic of Germany), represented by the Bundeskriminalamt (Federal Criminal Police Office, Germany) ('the BKA'), concerning the measures which the Federal Republic of Germany is required to take in order to protect WS against the adverse effects which may arise from the publication, at the request of a third State, of a red notice issued by the International Criminal Police Organisation ('Interpol') with regard to WS's ability to exercise his right to move freely.

Legal context

International law

The Constitution of Interpol

3 Article 2(1) of the Constitution of Interpol, adopted in 1956 in Vienna and last amended in 2017 ('the Constitution of Interpol'), states that 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 the Constitution of Interpol provides that:

'In order to further its aims, [Interpol] needs the constant and active co-operation 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.'

Interpol's Rules on the Processing of Data

5 Article 1(7) of Interpol's Rules on the Processing of Data, adopted in 2011 and last amended in 2019 ('Interpol's Rules on the Processing of Data'), provides as follows:

'For the purposes of the present Rules:

…

(7) "National Central Bureau" means any body designated by a country [affiliated to Interpol] to perform the liaison functions provided for under Article 32 of the [Constitution of Interpol].'

6 Article 73 of Interpol's Rules on the Processing of Data, headed '[Interpol] notices system', states, in paragraph 1:

'The [Interpol] notices system consists of a set of colour-coded notices published for specific purposes, and special notices published within the framework of specific cooperation not covered by the previous categories of notices.'

7 Under Article 80 of Interpol's Rules on the Processing of Data, headed 'Implementation of notices':

'(1) National Central Bureaus shall forward to:

(a) all relevant national authorities, as soon as possible and in accordance with their national laws, all the data contained in the notices they receive, as well as the updates regarding those notices;

…'

8 Article 82 of those rules, headed 'Purpose of red notices', states:

'Red notices are published at the request of a National Central Bureau or an international entity with powers of investigation and prosecution in criminal matters in order to seek the location of a wanted person and his/her detention, arrest or restriction of movement for the purpose of extradition, surrender, or similar lawful action.'

9 Article 83 of Interpol's Rules on the Processing of Data, headed 'Specific conditions for publication of red notices', provides, in paragraph 2(b), that red notices may be published only when sufficient judicial data have been provided, which are to include a reference to a valid arrest warrant or judicial decision having the same effect.

10 Article 87 of Interpol's Rules on the Processing of Data, headed 'Steps to be taken following the location of the person', provides:

'If a person who is the subject of a red notice is located, the following steps shall be taken:

(a) 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;

(ii) take all other measures permitted under national law and applicable international treaties, such as provisionally arresting the wanted person or monitoring or restricting his/her movement.

(b) The requesting National Central Bureau or international entity shall act immediately once it has been informed that the person has been located in another country and, in particular, shall ensure the swift transmission – within the time limits defined for the case in question – of data and supporting documents requested by the country where the person was located or by the General Secretariat.

…'

EU law

The CISA

11 Article 54 of the CISA, which is in Chapter 3, headed 'Application of the *ne bis in idem* principle', of Title III of the CISA, provides as follows:

‘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.’

12 Under Article 57(1) and (2) of the CISA:

‘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.’

Agreement on extradition between the European Union and the United States of America

13 The 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-USA Agreement’) does not lay down specific grounds for refusing extradition, with the exception of Article 13 thereof, which relates to the death penalty.

14 Article 17 of that agreement, headed ‘Non-derogation’, states:

‘1. This Agreement is without prejudice to the invocation by the requested State of grounds for refusal relating to a matter not governed by this Agreement that is available pursuant to a bilateral extradition treaty in force between a Member State and the United States of America.

2. 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.’

Directive 2016/680

15 Recitals 2, 25 and 64 of Directive 2016/680 state as follows:

‘(2) The principles of, and rules on the protection of natural persons with regard to the processing of their personal data should, whatever their nationality or residence, respect their fundamental rights and freedoms, in particular their right to the protection of personal data. This Directive is intended to contribute to the accomplishment of an area of freedom, security and justice.

…

(25) 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. …

…

(64) Member States should ensure that a transfer to a third country or to an international organisation takes place only if necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, and that the controller in the third country or international organisation is an authority competent within the meaning of this Directive. … Such a transfer may take place in cases where the [European] Commission has decided that the third country or international organisation in question ensures an adequate level of protection, where appropriate safeguards have been provided, or where derogations for specific situations apply. 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 by this Directive should not be undermined, including in cases of onward transfers of personal data from the third country or international organisation to controllers or processors in the same or in another third country or international organisation.'

16 Article 1(1) of that directive provides:

'This Directive lays down the rules relating to 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, including the safeguarding against and the prevention of threats to public security.'

17 Under Article 2(1) of Directive 2016/680, that directive 'applies to the processing of personal data by competent authorities for the purposes set out in Article 1(1)'.

18 Article 3(2) and (7) of that directive provides:

'For the purpose of this Directive:

…

(2) "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;

…

(7) "competent authority" means:

(a) any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security; or

(b) any other body or entity entrusted by Member State law to exercise public authority and public powers for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.'

19 Article 4 of Directive 2016/680, headed 'Principles relating to processing of personal data', states:

'1. Member States shall provide for personal data to be:

(a) processed lawfully and fairly;

(b) collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are processed;

…'

20 Article 7 of that directive, headed 'Distinction between personal data and verification of quality of personal data', provides, in paragraph 3:

'If it emerges that incorrect personal data have been transmitted or personal data have been unlawfully transmitted, the recipient shall be notified without delay. In such a case, the personal data shall be rectified or erased or processing shall be restricted in accordance with Article 16.'

21 Article 8 of that directive, headed 'Lawfulness of processing', provides that:

'1. 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.

2. Member State law regulating processing within the scope of this Directive shall specify at least the objectives of processing, the personal data to be processed and the purposes of the processing.'

22 Article 16 of that directive, headed 'Right to rectification or erasure of personal data and restriction of processing', provides, in paragraph 2:

'Member States shall require the controller to erase personal data without undue delay and provide for the right of the data subject to obtain from the controller the erasure of personal data concerning him or her without undue delay where processing infringes the provisions adopted pursuant to Article 4, 8 or 10, or where personal data must be erased in order to comply with a legal obligation to which the controller is subject.'

23 Chapter V of Directive 2016/680, headed 'Transfers of personal data to third countries or international organisations', comprises Articles 35 to 40 and governs, inter alia, the conditions under which personal data may be transferred to third countries or international organisations.

24 Article 36 of that directive, headed 'Transfers on the basis of an adequacy decision', provides, in paragraph 1, that Member States are to provide that a transfer of personal data to a third

country or an international organisation may take place where the Commission has decided that the third country, a territory or one or more specified sectors within that third country, or the international organisation in question ensures an adequate level of protection.

25 Article 37 of that directive, headed 'Transfers subject to appropriate safeguards', states, in paragraph 1, that, in the absence of such a decision, Member States are to provide that a transfer of personal data to a third country or an international organisation may take place where appropriate safeguards with regard to the protection of personal data are provided for in a legally binding instrument, or where the controller has assessed all the circumstances surrounding the transfer of personal data and concludes that appropriate safeguards exist with regard to the protection of personal data.

26 Article 40 of that directive, headed 'International cooperation for the protection of personal data', provides that, in relation to third countries and international organisations, the Commission and the Member States are to take appropriate steps, inter alia, to develop international cooperation mechanisms to facilitate the effective enforcement of legislation for the protection of personal data and to provide international mutual assistance in the enforcement of that legislation.

German law

27 Paragraph 153a(1) of the Strafprozessordnung (Criminal Procedure Code; 'the StPO') provides that, in the case of offences punishable by a fine or a minimum term of imprisonment of less than one year, the German public prosecutor's office may, with the agreement, as a general rule, of the court having jurisdiction to initiate the main proceedings and with the agreement of the person who is the subject of the criminal proceedings, provisionally forgo bringing criminal proceedings and impose on that person conditions and directions, such as the payment of a sum of money to a charitable organisation or to the public treasury, where those conditions or directions are such as to counteract the public interest in the bringing of proceedings and the seriousness of the wrongful act does not preclude it from doing so. That paragraph also provides that, if the person against whom criminal proceedings would have been brought complies with those conditions and directions, the conduct in question may no longer be treated as an offence for the purpose of that provision.

28 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 Criminal Police Office and the Cooperation between the Federal State and the *Länder* in Criminal Police Matters) of 1 June 2017 (BGBl. 2017 I, p. 1354), the BKA is the National Central Bureau of the Federal Republic of Germany for purposes of cooperation with Interpol.

The dispute in the main proceedings and the questions referred for a preliminary ruling

29 In 2012, at the request of the competent authorities of the United States of America, Interpol published a red notice in respect of WS ('the red notice in respect of WS'), a German national, in order to locate the latter and detain or arrest him or restrict his movements with a view potentially to extraditing him to the United States. That red notice was published on the basis of an arrest warrant issued by the competent authorities of the United States of America concerning, inter alia, accusations of corruption against WS.

30 According to the referring court, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany), the Staatsanwaltschaft München I (Public Prosecutor's Office I, Munich, Germany) had already initiated an investigation procedure into WS, which concerned the same acts

as those covered by the red notice, before that notice was published. That procedure was discontinued by a decision of 27 January 2010 after WS had paid a sum of money in accordance with Paragraph 153a(1) of the StPO. According to the referring court, criminal proceedings in respect of the acts at issue in the main proceedings could not therefore be brought in Germany.

31 In 2013, following an exchange with WS, the BKA arranged for Interpol to attach an addendum to the red notice in respect of WS, which stated that the BKA considered that the *ne bis in idem* principle, according to which a person cannot be prosecuted twice for the same offence, was applicable to the acts referred to in that notice.

32 In 2017, WS brought an action before the referring court against the Federal Republic of Germany, which is represented by the BKA. WS requested that that Member State be ordered to take all necessary measures to arrange for the red notice to be withdrawn. According to WS, the existence of the red notice in respect of him means that he cannot go to any Member State or to any State that is a party to the Agreement 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, signed in Schengen on 14 June 1985 (OJ 2000 L 239, p. 13) (the 'Contracting State') other than the Federal Republic of Germany without risking arrest, since, following the publication of that notice, the Member States and the Contracting States had added his name to their national lists of wanted persons. According to WS, first, that situation is contrary to Article 54 of the CISA and to Article 21 TFEU and, second, any processing by the authorities of the Member States of his personal data appearing in that red notice therefore constitutes an infringement of the provisions of Directive 2016/680.

33 The referring court notes that the processing of personal data contained in a red notice issued by Interpol is governed by Article 4(1) and Article 8(1) of Directive 2016/680. It follows from the latter provision that such processing is lawful only in so far as, first, it is necessary for the performance of a task carried out by a competent authority for the purposes set out in Article 1(1) of that directive and, second, it is based on EU law or on the law of a Member State. In the present case, the processing of WS's personal data contained in the red notice concerning him could therefore be lawful only if it was consistent with Article 54 of the CISA, read in conjunction with Article 50 of the Charter and Article 21 TFEU.

34 According to settled case-law, the *ne bis in idem* principle, enshrined in Article 50 of the Charter and in Article 54 of the CISA, seeks to prevent, in the area of freedom, security and justice provided for in Article 3(2) TEU, a person whose trial has been finally disposed of in a Member State or in a Contracting State from being prosecuted, while exercising his or her right to freedom of movement, for the same acts as those on the basis of which a final penalty has been imposed on him or her in another Member State or in another Contracting State.

35 Furthermore, it follows from the Court's case-law that Article 21 TFEU is applicable to extradition even in relations between a Member State and a third State. According to the referring court, that should also be the case where an international organisation, such as Interpol, acts as an intermediary, by publishing, at the request of a third State, a red notice for the arrest of a person or a restriction on that person's movements, for the purposes of his or her extradition to that third State. Only such an interpretation of the scope of Article 21 TFEU, it is said, would make it possible to remove the obstacles to the freedom of movement of EU citizens which result from the risk of extradition to a third State after they have spent time in a Member State other than their Member State of origin, which is unlawful where it is based on a charge which, in view of the prohibition on being punished twice for the same acts, infringes EU law.

36 According to the referring court, the inclusion, in national lists of wanted persons, of personal data contained in a red notice issued by Interpol constitutes a processing of personal data within the meaning of Article 2(1) of Directive 2016/680, read in conjunction with Article 1(1) of that directive. If the processing of personal data contained in such a notice is lawful only if it complies with Article 54 of the CISA, read in conjunction with Article 50 of the Charter and Article 21 TFEU, wanted-persons notices recorded in the Member States' lists of wanted persons following the publication of that notice should therefore, where that processing is not in accordance with Article 54 of the CISA, read in conjunction with Article 50 of the Charter and Article 21(1) TFEU, be erased, in accordance with Article 7(3) and Article 16 of Directive 2016/680.

37 The referring court states that the Commission and the Member States have apparently not made use, in so far as Interpol is concerned, of the opportunity offered by Article 40 of Directive 2016/680 to adopt rules on international cooperation in the field of the protection of personal data in respect of third countries and international organisations. Furthermore, Articles 36 and 37 of that directive concern only the transfer of personal data to Interpol, and not the transfer of such data by Interpol to the Member States. According to the referring court, that directive therefore contains a legal lacuna which should be filled. The fact that Interpol transfers personal data contained in its red notices to the Member States, despite the fact that the *ne bis in idem* principle applies to the acts covered by those notices, and does not ensure that those data are erased without delay where the processing of those data is unlawful, raises serious doubts as to the reliability of that organisation with regard to the protection of personal data.

38 According to the referring court, the outcome of the dispute in the main proceedings therefore depends on how Article 54 of the CISA, Article 50 of the Charter, Article 21(1) TFEU and the provisions of Directive 2016/680 are to be interpreted. If the *ne bis in idem* principle were to apply in the present case, which would mean that it was unlawful to continue to display, in national lists of wanted persons, a wanted-person notice in respect of WS, which had been issued by a third State and transmitted by means of an Interpol red notice, Member States would not be allowed to process the personal data appearing in that notice. Consequently, the wanted-person notices in respect of WS recorded in the Member States' lists of wanted persons following the publication of that red notice should be erased, which would thus ensure that WS can exercise his freedom of movement within the European Union and the Schengen Area.

39 In those circumstances, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 54 of the [CISA] in conjunction with Article 50 of 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] where 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 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 where this is contrary to the prohibition of double jeopardy?

(4) Are Article 4(1)(a) and Article 8(1) of Directive (EU) 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], 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 where there is no adequacy decision under Article 36 of Directive (EU) 2016/680 and/or there are no appropriate safeguards under Article 37 of Directive (EU) 2016/680?

(6) Are the Member States only allowed to further process data filed at [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?'

Procedure before the Court

40 The referring court requested that the present reference for a preliminary ruling be dealt with under the urgent preliminary-ruling procedure provided for in Article 107 of the Rules of Procedure of the Court.

41 On 12 July 2019, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court, having noted, inter alia, that WS was not in custody, decided that that request should not be granted.

Consideration of the questions referred

Admissibility

42 Several of the interested parties which submitted written observations or participated in the hearing before the Court have disputed the admissibility of the request for a preliminary ruling or of some of the questions submitted by the referring court.

43 First, the Belgian Government submits, in essence, that the referring court does not establish with sufficient precision the subject matter of the dispute in the main proceedings and the relevant facts and fails to explain the reasons which prompted it to inquire about the interpretation of the provisions of EU law referred to in the order for reference, contrary to the requirements of Article 94(a) and (c) of the Rules of Procedure.

44 Second, the Greek Government submits that it is not apparent from the order for reference that WS exercised his right to freedom of movement under Article 21 TFEU, which means that the question whether that right was infringed is hypothetical. Nor, it is argued, is it apparent from that order for reference that WS's personal data appearing in the red notice in respect of him were recorded in the Member States' lists of wanted persons after that notice was, in all likelihood, transmitted by Interpol to the competent authorities of the States affiliated to Interpol.

45 Third, according to the Federal Republic of Germany, the German Government and the Czech Government, the questions referred by the national court are purely hypothetical, since they bear no relation to the dispute in the main proceedings between WS and the Federal Republic of Germany. Those questions, it is submitted, relate exclusively to obligations imposed on Member States other than the Federal Republic of Germany.

46 Fourth, the Belgian, Czech, German and Netherlands Governments observe that the referring court, as a German court, does not have jurisdiction to decide how Member States other than the Federal Republic of Germany are obliged to act or not to act vis-à-vis WS.

47 Fifth, the Belgian and Czech Governments and the Commission submit that the fifth question, which relates to the level of protection of personal data ensured by Interpol, is inadmissible on the ground that it concerns a hypothetical situation.

48 Sixth and lastly, the Federal Republic of Germany, the Belgian, German and Spanish Governments and the United Kingdom Government argue that, in any event, following the deletion by Interpol, on 5 September 2019, of the red notice in respect of WS, the questions referred for a preliminary ruling have become devoid of purpose and are therefore inadmissible.

49 It must be recalled that, according to settled case-law, Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving, inter alia, the interpretation of provisions of EU law which are necessary for the resolution of the case before them and they are free to exercise that discretion at whatever stage of the proceedings they consider appropriate (judgment of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 35 and the case-law cited).

50 Similarly, the Court has repeatedly stated that questions submitted by national courts relating to EU law enjoy a presumption of relevance. The Court may thus refuse to rule on such questions only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgments of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraph 27 and the case-law cited, and of 26 June 2019, *Addiko Bank*, C-407/18, EU:C:2019:537, paragraph 36).

51 As regards the admissibility of the request for a preliminary ruling, it must be recalled, in the first place, that it is apparent from Article 94(a) and (c) of the Rules of Procedure that a request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court, inter alia, a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based and a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

52 In the present case, the request for a preliminary ruling satisfies the conditions laid down in that provision. That request provides, albeit succinctly, the necessary information concerning the relevant findings of fact and the subject matter of the dispute in the main proceedings, namely, first, the obstacle arising, in the opinion of the national court, from publication of the red notice in respect of WS and from the recording, in the national lists of wanted persons, of his personal data in that notice to WS's exercise of his freedom of movement in Member States and in Contracting States other than the Federal Republic of Germany, and, second, the efforts made by WS to secure

the removal of that obstacle by means of an action brought against that latter Member State. In addition, the referring court has stated, as mentioned in paragraph 37 above, the reasons which led it to submit a request for a preliminary ruling to the Court of Justice and the relationship which, in its view, exists between the provisions of EU law referred to in that request and the dispute in the main proceedings.

53 Moreover, it should be noted that all the interested parties which participated in the procedure before the Court were able to submit their observations effectively on the questions raised by the referring court, in the light of the relevant findings of fact and the subject matter of the dispute in the main proceedings as described in the request for a preliminary ruling.

54 In the second place, the fact that it is apparent from the request for a preliminary ruling that, following the publication of the red notice in respect of WS, he does not appear to have exercised his right to freedom of movement under Article 21(1) TFEU does not mean that the problem referred to in that request is hypothetical. It is clear from the information provided by the national court that WS brought the action pending before it specifically in order to create the conditions necessary to enable him to exercise his right to freedom of movement without incurring the risk of being arrested in the Member State to which he wishes to travel due to the existence of that red notice.

55 Moreover, as regards Directive 2016/680, although it is true that the request for a preliminary ruling does not refer to evidence which shows that WS's personal data appearing in the red notice in respect of him have actually been recorded in the Member States' lists of wanted persons other than those maintained by the Federal Republic of Germany following the publication of that notice by Interpol, it must nevertheless be observed that it is inconceivable that the States affiliated to Interpol, which include all Member States and Contracting States, can, in respect of persons sought via an Interpol red notice, satisfy their obligation to act in 'constant and active co-operation' with that organisation, as established in Article 31 of the Constitution of Interpol, without recording the personal data of persons appearing in such a notice in their own lists of wanted persons, unless there are valid reasons for not doing so.

56 Furthermore, it follows from Article 80 of Interpol's Rules on the Processing of Data that, in the case where a red notice is published by Interpol, the National Central Bureaus of the States affiliated to Interpol are required to forward all the data contained in that notice, which include the personal data of the person covered by that notice, to all the competent authorities of their affiliated States. Nothing has been put before the Court which raises doubt as to whether that transmission took place, in the Member States, as regards WS's personal data in the red notice concerning him.

57 In the third place, the fact that the questions referred for a preliminary ruling relate exclusively to obligations which are binding on Member States and Contracting States other than the Federal Republic of Germany does not mean that those questions bear no relation to the dispute in the main proceedings. Although the dispute concerns the alleged obligation of the Federal Republic of Germany, and, therefore, of the German authorities, to protect WS against the adverse effects, which may arise from Interpol's red notice in respect of him, on his exercise of his right to freedom of movement, the existence and scope of that obligation may depend on whether obligations are imposed on the Member States and the Contracting States in relation to a person who is the subject of an Interpol red notice in a situation where the *ne bis in idem* principle may apply, including with regard to the processing of personal data contained in such a notice within the meaning of Directive 2016/680.

58 In the fourth place, given that, as is apparent from the preceding paragraph, the action in the main proceedings is directed exclusively against the Federal Republic of Germany and, therefore, against the competent German authorities, the admissibility of the request for a preliminary ruling cannot be called into question on the ground that the referring court does not have jurisdiction to rule on the obligations devolving on the authorities of the other Member States. That court will be required, in the context of the dispute in the main proceedings, to rule only on the obligations devolving on the Federal Republic of Germany and the German authorities.

59 In the fifth and last place, although it is true that, following Interpol's deletion of the red notice in respect of WS on 5 September 2019, the obstacle which that notice may have constituted for WS's freedom of movement no longer existed, it must nevertheless be pointed out that the referring court informed the Court, in its reply of 11 November 2019 to a request from the Court concerning the potential consequences of that deletion for the request for a preliminary ruling, that WS had indicated his intention to convert his action into an action for a declaratory judgment (a *Feststellungsklage*) in order to request a declaration that, from now on, the Federal Republic of Germany has an obligation to take all measures necessary, first, to avoid any new red notice in respect of the same acts as those referred to in the red notice in respect of WS being published by Interpol and, second, to erase any new red notice in the event that it should be published by Interpol. That court states that it would also be possible to interpret the form of order sought in the main proceedings as meaning that WS is now pursuing an action for a judgment declaring an act unlawful (a *Fortsetzungsfeststellungsklage*).

60 In that regard, the referring court has also stated that the dispute in the main proceedings has not become devoid of purpose and that, in the case of each of the two actions referred to in the preceding paragraph, an answer to the questions which it raises continues to be necessary for the resolution of that dispute.

61 In that regard, it should be noted that, according to the settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to deliver judgment (see judgment of 26 October 2017, *Argenta Spaarbank*, C-39/16, EU:C:2017:813, paragraph 37 and the case-law cited).

62 So far as the admissibility of the various questions referred is concerned, it should be noted, as regards the first, second, third and fourth questions and the sixth question, that, in the light of the considerations set out by the referring court, it is not clear that the interpretation of EU law sought by that court bears no relation to the actual facts of the main action or to its purpose in the situation in which it finds itself following the deletion of the red notice in respect of WS on 5 September 2019 or that the problem referred to in the request for a preliminary ruling became hypothetical after that deletion.

63 It follows that the first, second, third and fourth questions and the sixth question must be held to be admissible.

64 The position is different as regards the fifth question. By that question, the referring court seeks, in essence, to ascertain whether Interpol applies an adequate level of protection of personal data to enable the authorities subject to the provisions of Directive 2016/680 to transfer those data to that organisation. The referring court has in no way explained why the Court's answer to that question is necessary for the purposes of resolving the dispute in the main proceedings.

65 It is true that it is apparent from Article 87 of Interpol's Rules on the Processing of Data that the State on whose territory a person sought via a red notice has been located must immediately inform the authority which issued that notice and Interpol that that person has been located, subject to the restrictions arising from the legislation of that State and the applicable international treaties. To that extent, a red notice issued by Interpol is therefore liable to lead to a transfer of personal data from a Member State to Interpol. However, that situation is not referred to by the referring court, which, so far as its doubts as to Interpol's reliability in terms of personal-data protection are concerned, relies solely on the fact that Interpol transferred such data to the Member States through the red notice in respect of WS and maintained that notice on the date of the request for a preliminary ruling, despite the fact that, according to the referring court, the *ne bis in idem* principle was applicable.

66 In those circumstances, since the interpretation of EU law sought in the fifth question manifestly bears no relation to the actual facts of the main action or its purpose, it must be declared inadmissible.

Substance

First, second and third questions

67 By its first, second and third questions, which it is appropriate to examine together, the referring court seeks to ascertain, in essence, whether Article 54 of the CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, preclude the provisional arrest, by the authorities of a Contracting State or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, in the case where, first, that person has already been the subject of criminal proceedings in a Contracting State or in a Member State which have been discontinued by the public prosecutor after the person concerned fulfilled certain conditions and, second, the authorities of that Contracting State or of that Member State have informed Interpol that, in their opinion, those proceedings relate to the same acts as those covered by that red notice.

68 As a preliminary point, it should be noted that it is apparent from Article 87 of Interpol's Rules on the Processing of Data that, where a person who is the subject of a red notice is located in a State affiliated to Interpol, that State must, inter alia, provisionally arrest the wanted person or monitor or restrict his or her movements, in so far as those measures are authorised under national legislation and the applicable international treaties.

69 Article 54 of the CISA precludes a Contracting State from taking action against a person for the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting State, 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 that latter State.

70 Furthermore, as is apparent from Article 54 of the CISA and Article 50 of the Charter, the *ne bis in idem* principle derives from the constitutional traditions common to both Member States and Contracting States. It is therefore appropriate to interpret Article 54 of the CISA in the light of Article 50 of the Charter, Article 54 serving to ensure respect for the essence of Article 50 (judgment of 24 October 2018, *XC and Others*, C-234/17, EU:C:2018:853, paragraph 14 and the case-law cited).

71 Article 21(1) TFEU provides that every citizen of the European Union is to have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

72 In order to answer the first, second and third questions, it is therefore necessary to examine whether, first, the *ne bis in idem* principle may also apply in the case of a decision adopted by a body other than a criminal court and, second, whether a person covered by that decision, who is subsequently provisionally arrested following the publication by Interpol of a red notice in respect of him or her, may be regarded as being 'prosecuted', within the meaning of Article 54 of the CISA, and as thereby being subject to a restriction on his or her freedom of movement which is incompatible with Article 21(1) TFEU, those two articles being read in the light of Article 50 of the Charter, in the case where the applicability of the *ne bis in idem* principle has not been established but the authorities of a Member State or of a Contracting State have informed the competent authorities of other Member States or Contracting States of their doubts as to whether new criminal proceedings to which that notice relates are compatible with that principle.

73 In the first place, as regards the question whether the *ne bis in idem* principle can also apply in the case of a decision adopted by a body other than a criminal court, the Court has already held that the *ne bis in idem* principle, enshrined in Article 54 of the CISA, applies to procedures whereby further prosecution is barred, such as that referred to in Paragraph 153a of the StPO, by which the public prosecutor of a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the public prosecutor (judgment of 11 February 2003, *Gözütok and Brügge*, C-187/01 and C-385/01, EU:C:2003:87, paragraphs 22, 27 and 48), provided that that decision is based on a determination as to the merits of the case (see, to that effect, judgment of 10 March 2005, *Miraglia*, C-469/03, EU:C:2005:156, paragraphs 34 and 35).

74 As is apparent from the information provided by the national court, WS was the subject of criminal proceedings in Germany, which were definitively discontinued by a decision of 27 January 2010, after WS had paid a sum of money, in accordance with Paragraph 153a(1) of the StPO. It follows that the *ne bis in idem* principle, enshrined in both Article 54 of the CISA and Article 50 of the Charter, is capable of applying to the acts to which that decision relates.

75 As regards, in the second place, the question whether Article 54 of the CISA may preclude the provisional arrest of a person who is the subject of an Interpol red notice, it should be recalled that that provision precludes a person whose trial has been finally disposed of in a Contracting State from being 'prosecuted' in another Contracting State.

76 In that regard, it should be noted that the wording of Article 54 of the CISA does not, in itself, provide an answer to the question whether a person who is the subject of an Interpol red notice and who has been provisionally arrested may be regarded as being 'prosecuted' within the meaning of that provision.

77 However, it is settled case-law that it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (see, inter alia, judgment of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, paragraph 44 and the case-law cited).

78 As regards the context of Article 54 of the CISA, Article 50 of the Charter, which establishes the *ne bis in idem* principle as a fundamental right under EU law, provides that no one is to 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 European Union in accordance with the law. As the Court has noted previously, it is apparent from that provision that the *ne bis in idem* principle prohibits a duplication both of proceedings and of penalties which are criminal in nature for the purposes of that article in respect of the same acts and against the same person (judgment of 20 March 2018, *Garlsson Real Estate and Others*, C-537/16, EU:C:2018:193, paragraph 27 and the case-law cited).

79 As regards the objective pursued by Article 54 of the CISA, it is apparent from case-law that the *ne bis in idem* principle set out in Article 54 of the CISA is intended to ensure, in the area of freedom, security and justice, that a person whose trial has been finally disposed of is not prosecuted in several Contracting States for the same acts on account of his or her having exercised his or her right to freedom of movement, the aim being to ensure legal certainty – in the absence of harmonisation or approximation of the criminal laws of the Member States – through respect for decisions of public bodies which have become final. Article 54 of the CISA should in this respect be interpreted in the light of Article 3(2) TEU, which states that the European Union is to offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with regard to, amongst other matters, the prevention and combating of crime (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraphs 44 and 46 and the case-law cited). Specifically, it follows from that case-law that a person whose case has already been finally disposed of must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State (judgment of 28 September 2006, *Gasparini and Others*, C-467/04, EU:C:2006:610, paragraph 27 and the case-law cited).

80 In that regard, Article 54 of the CISA necessarily implies that the Contracting States have mutual trust in their respective criminal justice systems and that each of them consents to the application of 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 (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraphs 50 and 51).

81 However, it is also apparent from case-law 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 (judgment of 29 June 2016, *Kossowski*, C-486/14, EU:C:2016:483, paragraph 52).

82 It follows that the authorities of a Contracting State are required to refrain from prosecuting a person for certain acts themselves, or from assisting a third State in the prosecution of such a person by provisionally arresting that person, only if it is established that the trial of that person in respect of the same acts has already been finally disposed of by another Contracting State, within the meaning of Article 54 of the CISA, and that, consequently, the *ne bis in idem* principle applies.

83 As the Advocate General observed, in essence, in point 94 of his Opinion, that interpretation is confirmed by Article 57 of the CISA, according to which the authorities of a Contracting State in which a person is accused of an offence may, where they have reason to believe that that charge relates to the same acts as those in respect of which the person’s trial has been finally disposed of in another Contracting State, request from the competent authorities of the latter State the information necessary to determine whether the *ne bis in idem* principle applies. It is clear from that provision

that the mere possibility that that principle may apply is not sufficient to prevent a Contracting State from taking any further action against the person concerned.

84 The provisional arrest of a person who is the subject of an Interpol red notice, published at the request of a third State, may, in a situation where there is doubt as to the applicability of the *ne bis in idem* principle, constitute an essential step in order to carry out the necessary checks in that regard while avoiding the risk that the person concerned may abscond and thus avoid potential prosecution, in that third State, for acts in respect of which the person's trial has not been finally disposed of by a Contracting State. It follows that, in such a situation, Article 54 of the CISA does not preclude such provisional arrest, provided that it is essential for the purpose of those checks.

85 The same interpretation must apply with regard to Article 21(1) TFEU, read in the light of Article 50 of the Charter.

86 In that regard, while a provisional arrest does indeed constitute a restriction of the right of the person concerned to freedom of movement, it must nevertheless, in a situation where the applicability of the *ne bis in idem* principle remains uncertain, be regarded as justified by the legitimate aim of preventing that person from evading punishment, an objective which, as the Court has held, falls within the context of the area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured, as provided for in Article 3(2) TEU (see, to that effect, judgments of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraphs 36 and 37, and of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 60).

87 Such a provisional arrest is likely to facilitate criminal proceedings against that person following his or her potential extradition to the third State at whose request the Interpol red notice in respect of him or her was published, in the event that the *ne bis in idem* principle does not preclude it. The Court has already held that extradition is a procedure the specific aim of which is to combat the impunity of a person who is present in a territory other than that in which he or she has allegedly committed an offence, and thus allows offences committed in the territory of a State by persons who have fled that territory not to remain unpunished (judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 61 and the case-law cited).

88 It follows that both the authorities of a Contracting State and those of a Member State are free to make a provisional arrest of a person who is the subject of a red notice published by Interpol until such time as it has been established that the *ne bis in idem* principle applies.

89 By contrast, where the authorities of a Contracting State or of a Member State to which that person travels have become aware of the fact that a final judicial decision has been taken in another Contracting State or in another Member State establishing that the *ne bis in idem* principle applies with regard to the acts covered by that red notice, where appropriate after obtaining the necessary information from the competent authorities of the Contracting State or of the Member State in which it is alleged that a public prosecution in respect of the same acts has been barred, both the mutual trust which is required between Contracting States under Article 54 of the CISA, as noted in paragraph 80 above, and the right to freedom of movement guaranteed in Article 21(1) TFEU, read in the light of Article 50 of the Charter, preclude those authorities from making a provisional arrest of that person or, as the case may be, from keeping that person in custody.

90 As regards, first, Article 54 of the CISA, provisional arrest must be regarded, in such a situation, as a measure which no longer has the purpose of ascertaining whether the conditions for the application of the *ne bis in idem* principle have been satisfied, but solely of contributing to the

effective prosecution of the person concerned in the third State which is the origin of the publication of the red notice at issue, as the case may be after his or her extradition to that State.

91 As regards, second, Article 21(1) TFEU, read in the light of Article 50 of the Charter, the restriction of the right of the person who is the subject of the red notice to freedom of movement entailed by his or her provisional arrest would not, in a situation such as that described in paragraph 89 above, be justified by the legitimate objective of preventing the risk of impunity, since the trial of that person in respect of the acts covered by the red notice has already been finally disposed of.

92 In order to ensure, in such a situation, the effectiveness of Article 54 of the CISA and of Article 21(1) TFEU, read in the light of Article 50 of the Charter, the Member States and the Contracting States must ensure the availability of legal remedies enabling the persons concerned to obtain a final judicial decision establishing that the *ne bis in idem* principle applies, as referred to in paragraph 89 above.

93 The interpretation of Article 54 of the CISA and of Article 21(1) TFEU, read in the light of Article 50 of the Charter, referred to in paragraphs 89 to 91 above, is not called into question by the arguments raised by a number of the governments which participated in the procedure before the Court to the effect that Article 54 of the CISA is applicable only within the Schengen Area and that the *ne bis in idem* principle does not constitute an absolute ground justifying a refusal to extradite under the EU-USA Agreement.

94 First, although Article 54 of the CISA is clearly not binding on a State which is not a Contracting State and which therefore does not form part of the Schengen Area, it must be observed that the provisional arrest of a person who is the subject of an Interpol red notice by one of the Contracting States constitutes, even where that notice was published at the request of a third State in the context of the criminal proceedings which it has initiated against that person, an action by that Contracting State which thus forms part of criminal proceedings that extend, as has been held in paragraphs 86 and 87 above, to the territory of the Contracting States, and which has the same adverse effect on that person's right to freedom of movement as would the same action taken in the context of criminal proceedings conducted entirely within that Contracting State.

95 It follows that, as the Advocate General stated in points 60 to 64 of his Opinion, only an interpretation of Article 54 of the CISA to the effect that such an action by a Contracting State comes within the concept of 'prosecution' within the meaning of that article is capable of achieving the objective pursued by that article.

96 The lawfulness of the action of one of the Contracting States consisting in the provisional arrest of a person who is the subject of an Interpol red notice therefore depends on whether that action complies with Article 54 of the CISA, with paragraphs 89 and 90 above providing an illustration of a situation in which such an arrest infringes that provision.

97 Second, as regards the EU-USA Agreement, it is true that that agreement, the purpose of which is, in accordance with Article 1 thereof, to enhance cooperation between the European Union and the United States of America in the context of applicable extradition relations between the Member States and that third State, does not expressly provide that, where the *ne bis in idem* principle applies, the authorities of the Member States may refuse an extradition requested by the United States of America.

98 However, it must be borne in mind that the situation referred to in the request for a preliminary ruling concerns the provisional arrest of a person who is the subject of a red notice published by Interpol at the request of a third State, and not the extradition of that person to that State. In order to determine whether the interpretation of Article 54 of the CISA referred to in paragraphs 89 and 90 above might conflict with international law, it is therefore necessary to examine first of all the provisions relating to the publication of Interpol's red notices and the legal consequences of those notices, set out in Articles 82 to 87 of Interpol's Rules on the Processing of Data.

99 It is apparent from Article 87 of those rules that the States affiliated to Interpol are required, if a person who is the subject of a red notice is located in their territory, provisionally to arrest that person only in so far as such a measure is 'permitted under national law and applicable international treaties'. In the event that the provisional arrest of a person who is the subject of an Interpol red notice is incompatible with EU law, where that notice relates to acts to which the *ne bis in idem* principle applies, a State affiliated to Interpol would therefore not fail, by refraining from making such an arrest, to fulfil its obligations as a member of that organisation.

100 In addition, it is apparent from case-law that, although, in the absence of EU legal provisions governing the extradition of nationals of Member States to a third State, Member States retain the power to adopt such rules, those Member States are required to exercise that power in accordance with EU law, in particular the right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU (see, to that effect, judgments of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraph 45, and of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 48).

101 In the present case, it is apparent from the request for a preliminary ruling that it has not been established that the red notice in respect of WS, which was published by Interpol in 2012, concerned the same acts as those in respect of which WS's trial had been finally disposed of, within the meaning of Article 54 of the CISA, in Germany.

102 Consequently, it must be held that, in accordance with what has been set out in paragraph 88 above, the provisional arrest of WS in a Contracting State or in a Member State does not infringe, at that stage, either Article 54 of the CISA or Article 21(1) TFEU, read in the light of Article 50 of the Charter.

103 That result is consistent, as the Advocate General observed in point 98 of his Opinion, with the provisions of 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) and Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1).

104 First, although, under Article 3(2) of Framework Decision 2002/584, the execution of a European arrest warrant is to be refused if the judicial authority of the executing Member State is informed that the *ne bis in idem* principle applies, it is apparent from Article 12 of that framework decision that, when a person is arrested on the basis of a European arrest warrant, it is for that authority to decide whether that person should remain in detention, in accordance with the law of the executing Member State. It follows that the arrest of the person concerned or his or her continued detention is precluded only if that authority has established that the *ne bis in idem* principle applies.

105 Second, while, according to Article 11(1)(d) of Directive 2014/41, the execution of a European Investigation Order issued by a Member State may be refused in the executing Member State where such execution would be contrary to the *ne bis in idem* principle, it is apparent from recital 17 of that directive that, given the preliminary nature of the procedures underlying the European Investigation Order, its execution should not be subject to refusal where it is aimed at establishing whether a possible conflict with the *ne bis in idem* principle exists.

106 In the light of the foregoing, the answer to the first, second and third questions is that Article 54 of the CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter, must be interpreted as not precluding the provisional arrest, by the authorities of a Contracting State or by those of a Member State, of a person in respect of whom Interpol has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a Contracting State or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a Contracting State or by a Member State respectively.

Fourth and sixth questions

107 By its fourth and sixth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the provisions of Directive 2016/680, read in the light of Article 54 of the CISA and of Article 50 of the Charter, must be interpreted as precluding the processing, by the authorities of the Member States, of personal data appearing in a red notice issued by Interpol in the case where the trial of the person covered by that red notice in respect of the same acts as those on which that red notice is based has already been finally disposed of by a Member State and where, consequently, the *ne bis in idem* principle applies.

108 More specifically, the referring court seeks to ascertain whether, in such circumstances, the authorities of the Member States may record the personal data appearing in such a red notice in their lists of wanted persons or retain such a record where it has already been created.

109 According to Article 3(2) of Directive 2016/680, ‘processing’ means, for the purposes of that directive, ‘any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automatic means, such as collection, recording … erasure or destruction’.

110 Under Article 2(1) of that directive, the latter applies to the processing of personal data by competent authorities for the purposes set out in Article 1(1) of that directive, namely for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security.

111 The recording, in a Member State’s lists of wanted persons, of personal data appearing in an Interpol red notice, carried out by the authorities of that State on the basis of national law, therefore constitutes processing of those data which comes within the scope of Directive 2016/680. The same applies with regard to any other operation or set of operations performed on those data within the meaning of Article 3(2) of that directive.

112 Furthermore, under Article 4(1)(a) and (b) of Directive 2016/680, Member States must, inter alia, provide for personal data to be, first, processed lawfully and fairly and, second, collected for specified, explicit and legitimate purposes and not processed in a manner that is incompatible with those purposes. Article 8(1) of that directive provides that ‘processing [is] 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'.

113 As is apparent from recital 25 of Directive 2016/680, given that, in order to fulfil its mission, Interpol receives, stores and circulates personal data to assist competent authorities of the States affiliated to that organisation in preventing and combating international crime, it is appropriate to strengthen cooperation between the European 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'.

114 It follows that the processing, by the competent authorities of the Member States, of personal data appearing in an Interpol red notice pursues a legitimate purpose within the meaning of Article 4(1)(b) of Directive 2016/680.

115 It is true that Article 4(1)(a) of Directive 2016/680 provides that, in order to comply with that directive, the processing of personal data must be lawful. It is also true that, as noted by the referring court, it is apparent from Article 7(3) and Article 16(2) of Directive 2016/680 that the erasure of personal data may, in principle, be requested if those data have been transmitted unlawfully.

116 However, as the Advocate General observed, in essence, in point 112 of his Opinion, it cannot be inferred from the fact that a red notice issued by Interpol concerns acts in respect of which the *ne bis in idem* principle could apply that the personal data contained in that notice have been unlawfully transmitted and that the processing of those data should be regarded as unlawful.

117 First, the transmission of those data by Interpol does not constitute processing of personal data covered by Directive 2016/680, since that organisation is not a 'competent authority' within the meaning of Article 3(7) of that directive. Second, neither that directive nor any other rule of EU law provides that the processing of personal data contained in an Interpol red notice is precluded in the case where the *ne bis in idem* principle may apply.

118 Such processing, which is based on the relevant provisions of Member State law, is, in principle, also necessary for the performance of a task carried out by the competent authorities of those States for the purposes set out in Article 1(1) of Directive 2016/680, within the meaning of Article 8(1) of that directive. Those competent authorities, which include, under Article 3(7) of that directive, any public authority competent for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, would be incapable of performing their task if it were not possible for them, in principle, to include, in national lists of wanted persons, a person's personal data contained in an Interpol red notice in respect of that person and to undertake any other processing of those data which may prove necessary in that context.

119 Moreover, in accordance with what was stated in paragraph 84 above, the processing, by the authorities of the Member States, of personal data appearing in an Interpol red notice may, where there are merely indications suggesting that that notice may relate to acts to which the *ne bis in idem* principle applies, be indispensable precisely in order to determine whether that is the case.

120 However, it must be borne in mind that, where it has been established, by means of a final judicial decision taken in a Contracting State or in a Member State, that a red notice issued by Interpol does indeed relate to the same acts as those in respect of which the trial of the person to whom that notice relates has been finally disposed of and that, consequently, the *ne bis in idem*

principle applies, that person can no longer, as is apparent from the reply given to the first, second and third questions and having regard to Article 54 of the CISA read in the light of Article 50 of the Charter, be the subject of criminal proceedings in respect of those same acts and, consequently, can no longer be arrested in the Member States on the basis of those acts. It must therefore be held that, in those circumstances, the recording, in the Member States' lists of wanted persons, of the personal data contained in an Interpol red notice is no longer necessary, with the result that the data subject must be able to request, under Article 16(2) of Directive 2016/680, that the controller erase personal data relating to him or her without undue delay. However, if those data remain recorded, they must be accompanied by a note that the person in question may no longer be prosecuted in a Member State or in a Contracting State for the same acts by reason of the *ne bis in idem* principle.

121 In the light of the foregoing considerations, the answer to the fourth and sixth questions is that the provisions of Directive 2016/680, read in the light of Article 54 of the CISA and of Article 50 of the Charter, must be interpreted as not precluding the processing of personal data appearing in a red notice issued by Interpol in the case where it has not been established in a final judicial decision taken in a Contracting State or in a Member State that the *ne bis in idem* principle applies in respect of the acts on which that notice is based, provided that such processing satisfies the conditions laid down by that directive, in particular in that it is necessary for the performance of a task carried out by a competent authority, within the meaning of Article 8(1) of that directive.

Costs

122 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **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, signed in Schengen on 19 June 1990 and which entered into force on 26 March 1995, and Article 21(1) TFEU, read in the light of Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the provisional arrest, by the authorities of a State that is a party to the Agreement 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, signed in Schengen on 14 June 1985, or by those of a Member State, of a person in respect of whom the International Criminal Police Organisation (Interpol) has published a red notice, at the request of a third State, unless it is established, in a final judicial decision taken in a State that is a party to that agreement or in a Member State, that the trial of that person in respect of the same acts as those on which that red notice is based has already been finally disposed of by a State that is a party to that agreement or by a Member State respectively.**

2. **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, and repealing Council Framework Decision 2008/977/JHA, read in the light of Article 54 of the Convention implementing the Schengen Agreement, signed on 19 June 1990, and of Article 50 of the Charter of Fundamental Rights, must be interpreted as**

not precluding the processing of personal data appearing in a red notice issued by the International Criminal Police Organisation (Interpol) in the case where it has not been established in a final judicial decision taken in a State that is a party to the Agreement 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, signed in Schengen on 14 June 1985, or in a Member State that the *ne bis in idem* principle applies in respect of the acts on which that notice is based, provided that such processing satisfies the conditions laid down by that directive, in particular in that it is necessary for the performance of a task carried out by a competent authority, within the meaning of Article 8(1) of that directive.

3. **The fifth question referred for a preliminary ruling is inadmissible.**

[Signatures]

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* Language of the case: German.