



Request concerning [...] (Ref. CCF/[...])

DECISION OF THE COMMISSION (107th session, 28 January to 1 February 2019)

[...], withdrawing based on Article 2.1(d) of the Operating rules of the Commission,

The Commission for the Control of INTERPOL's Files (the Commission), sitting as the Requests Chamber, composed of:

[...]
Members,

Having deliberated in camera during its 107th session, on [...], delivered the following Decision.

I. PROCEDURE

1. On [...], Mr [...] (the Applicant) lodged a complaint addressed to the Commission for the Control of INTERPOL's Files (the Commission), requesting access to the data concerning him registered in INTERPOL's files, and its subsequent deletion. Following the submission of all the required documents in accordance with Rule 30 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed the Applicant thereof on [...].
2. In the context of the Applicant's request for access, the Commission consulted the INTERPOL National Central Bureau (NCB) of [...] in accordance with Article 35 of the Statute of the Commission (the Statute), on the issue of disclosure of information.
3. On [...], upon obtaining the authorization of the source of the data, the Commission informed the Applicant that he is wanted through INTERPOL's channels by the NCB of [...], and provided the information described in paragraph 7 below.
4. In the context of the Applicant's request for correction/deletion, the Commission consulted the NCB of [...] and INTERPOL's General Secretariat (IPSG) in accordance with Article 34(1) of the Statute, on the arguments set forth by the Applicant.
5. Both the Applicant and the NCB source of the data challenged were informed of the fact that the Commission would study the case during its 107th session.

II. FACTS

6. The Applicant is a national of [...] and the [...]. He was the Managing Director of [...].
7. He is the subject of a Red Notice issued at the request of the NCB of [...] for [...] on the basis of an arrest warrant issued on [...].
8. The summary of the facts, as recorded in the Red Notice, is the following: [...].
9. An extract of the Red Notice was published on INTERPOL's website until it was withdrawn [...] by INTERPOL's General Secretariat, after a determination that it no longer met the "Criteria for Publication of Extracts of Red Notices on the INTERPOL public website".

III. THE APPLICANT'S REQUEST

10. The Applicant requested the deletion of the data concerning him, contending in essence that :

NOT INTENDED FOR PUBLIC DISSEMINATION



- a) the case is grounded on a commercial/private dispute and lacks criminal character ;
- b) [...] authorities failed to request his extradition while being aware of his locations ;
- c) the Red Notice can no longer achieve its purpose, following extradition denial decisions concerning one of his alleged accomplices ;

IV. APPLICABLE LEGAL FRAMEWORK

11. Field of competence of the Commission:

- Article 36 of INTERPOL's Constitution states that the Commission shall ensure that the processing of personal data by the Organization is in compliance with the regulations the Organization establishes in this matter".
- Article 3(1)(a) and Article 33(3) of the Statute of the Commission establish that the powers of the Commission are limited to controlling whether the processing of data in INTERPOL's files meets INTERPOL's applicable legal requirements.

12. Lack of criminal character and private nature of the dispute :

- Article 10.1 of the RPD states "that the processing of data in the INTERPOL Information System may only be carried out for a given, explicit purpose which is in conformity with the Organization's aims and activities."
- Article 83.1(a,i) of INTERPOL's Rules on the Processing of Data (RPD) states that "red notices may not be published for offences relating to private matters and for offences originating from a violation of laws or regulations of an administrative nature, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime".
- Article 83.2(b,i) of the RPD requires that "red notices may be published only when sufficient judicial data has been provided. Sufficient judicial data will be considered to include at least summary of facts of the case, which shall provide a succinct and clear description of the criminal activities of the wanted person, including the time and location of the alleged criminal activity."
- Article 35(1) of the RPD states that "In conformity with Article 5(3) of the present Rules, prior to any recording of data in a police database, the National Central Bureau, national entity or international entity shall ensure that the data are of interest for the purposes of international police cooperation."

13. Extradition issues and purpose for the publication of Red Notices:

- Article 82 of the RPD states that "Red Notices are published (...) 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."
- Article 84(b) of the RPD further states that the requesting National Central Bureau who has asked for the publication of a Red Notice "shall ensure (...) that extradition will be sought upon arrest of the person, in conformity with national laws and/or the applicable bilateral and multilateral treaties."
- Article 87(b) also states that "The requesting National Central Bureau 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."
- INTERPOL General Assembly Resolution AGN/53/RES/7 of 1984 states that "if certain countries refuse extradition, this is reported to the other NCBs in an addendum to the original notice".



V. FINDINGS

14. The Commission assesses the Applicant's relevant contentions in the order in which they are described in Section III above. Yet the Commission decided to study together under point B below the related issues of the alleged lack of purpose of the Red Notice and the alleged lack of extradition efforts from [...] authorities, since they are closely related and refer to similar legal provisions. Finally, the Commission will also briefly review the Applicant's remaining contentions.

A. Lack of criminal character and private/commercial nature of the underlying dispute

a) *The Applicant*

15. The Applicant alleges that in the [...], he was the managing director of a [...] firm based in [...] whose business was the purchase and export [...]. Essentially, [...] in full compliance with [...] customs and exportation regulations.

16. [...]

17. [...] provided the specific legal means for penalizing those enterprises which acted in defiance of the de facto monopoly.

18. The Applicant claims that the criminal charges levelled at him arise out of a large shipment [...] seized the shipment citing administrative irregularities. Criminal proceedings were subsequently instituted against him [...].

19. Essentially, the Applicant contends that he was accused of acting in consort [...] to smuggle contraband thereby evading various [...] value added taxes. [...] make clear the economic nature of the crimes [...] [...].

20. He further claims that the Red Notice should have been refused by INTERPOL's General Secretariat as the criminal proceedings at its basis clearly emerge from a commercial conflict having a direct impact on strategic economic considerations [...].

b) *The NCB of [...] (NCB source of the data)*

21. In its reply, the NCB of [...] insisted on the criminal nature of the prosecution, which has been prompted by the lack of respect by the Applicant of the legal framework [...], a highly regulated sector [...]. The NCB indicated that the criminal prosecution of the Applicant can in no way be construed as a political persecution, and that it is not related to any political elements but merely to economic crimes [...].

22. The NCB explained that the criminal investigation established that in [...], the Applicant, acting as director [...] created a stable organized criminal group to commit illegal transactions [...], to store and transport them unlawfully, and to evade from the payment of taxes [...] to generate illegal material benefit. [...]. The NCB of [...] transmitted judicial documents presenting in more detail the transactions concerned, and outlining the alleged role of each defendant.

23. According to the material adduced, the Applicant and his company, with the help of accomplices, made transactions involving [...] without having obligatory permissions from [...] State Inspection [...].

24. On [...], the Applicant was put on the [...] wanted list and information was transmitted by the NCB of [...] through INTERPOL's channels. In connection with evolutions of the criminal legislation, a ruling was issued on [...] terminating criminal prosecution with regard to the commission of contraband as [...]. Since then, the pre-judicial investigation has been suspended on several occasions due to the determination that the Applicant was evading justice [...].

25. The NCB indicated that he Applicant was repeatedly notified at several stages of the proceedings at the established address of his residence abroad, in order to allow for his participation to the criminal investigation, but he has chosen not to provide his observations or to be present in court. [...]. His awareness of the charges is also confirmed by the letter from him received by the Investigatory



Department of [...], and by the reverse of the summons handed to him [...]. In addition, [...] has transmitted summons to him in execution of a mutual legal assistance request [...].

26. The expiration of terms of the criminal prosecution established by the Criminal Code [...] is suspended according [...] of the above-mentioned Code, since the Applicant has consistently evaded from the investigation, and the Applicant does not possess any immunity which would release him from criminal liability, so he is still wanted by [...] judicial authorities.

c) Findings of the Commission

27. With respect to the allegation that the conduct was not criminal in nature and originates in a commercial or private dispute, the Commission recalled that under Article 83(1)(a)(i) of the RPD “Red notices may not be published for offences relating to private matters and for offences originating from a violation of laws or regulations of an administrative nature, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime”.
28. In addition, Article 83(2)(b)(i) of the RPD requires that sufficient information is provided regarding the charges and penalties, demonstrating that the Applicant is charged with a valid arrest warrant and showing the Applicant’s possible effective personal participation in criminal conduct of which he is charged. Thus, the processing of data in INTERPOL’s files requires the NCB to provide sufficient facts linking the wanted individual to the charges against him, and demonstrating that his conduct is either not of a private or administrative nature, or otherwise that it was aimed at facilitating serious criminality or organized crime.
29. In the present case, the Commission established on the basis of the judicial documents provided by the NCB of [...] that the Applicant is wanted in connection with ordinary-law offences [...] and punished by serious penalties. The Commission also determined that the NCB of [...] has put forward sufficient elements to indicate the possible effective participation of the Applicant to the criminal acts concerned, by providing additional elements on the context of the transactions, on the role of each alleged accomplices, and on the purported scheme to generate unlawful personal benefit through the [...] transactions.
30. The Commission resolved that although the criminal acts in this case revolve around international [...] transactions and have as such a commercial background, they nonetheless constitute violations of the legal framework established in a highly regulated sector. The Commission found that adequate elements have been produced by the NCB of [...] to highlight the possible criminal intent of the Applicant and his accomplices, to illustrate the actual transactions which were determined as unlawful, and to exemplify the Applicant’s efforts in order to attempt to dissimulate the alleged behaviour, so that these activities can be considered as criminal in nature. In this connection, the Commission established that the mere fact that [...] authorities may have participated in the protection of a *de facto* monopoly through [...] and the [...] and that they enacted a legislation which was unfavourable to smaller companies active on the [...] market, does not in itself deprive the Applicant’s alleged acts of their criminal nature.
31. Yet the Commission noted that, according to the latest information provided by the NCB of [...], a ruling was issued on [...] terminating criminal prosecution with regard to the commission of contraband [...] and in consequence of criminal legislative evolutions. Therefore, should the Commission conclude that the data is compliant with INTERPOL’s rules, any reference to the charges of contraband shall be removed from the Applicant’s file in INTERPOL’s Information System in order to ensure the quality of the data, which must be updated to remain accurate.

B. Lack of extradition request and continued purpose for the Red Notice

a) The Applicant

32. Moreover, the Applicant claims that Mr [...] (his alleged accomplice) was subjected to a red notice for the exact same allegations in the same criminal case. Subsequent to his arrest in [...] on the basis of a red notice, Mr [...] extradition to [...] for the same charges was denied in [...] by [...] judicial authorities on two grounds. Firstly, it was held that the European Convention on Extradition was



inapplicable [...]. Secondly, the Court of Appeal [...] found that the corresponding [...] crimes [...] would not be prosecutable because of statutory limitation.

33. Therefore, the Applicant claims that in case he was to be arrested on the basis of the Red Notice issued against him, his extradition would most likely be denied on similar grounds by any INTERPOL member country. Furthermore, he asserts that [...] authorities have not taken any action to request his extradition from [...], despite their awareness of his location in [...] for several years, in clear violation of INTERPOL's Rules on the processing of data.

b) The NCB of [...]

34. The NCB of [...] did not provide comments or observations on the decision by [...] judicial authorities to deny Mr [...] extradition to [...].
35. The NCB of [...] indicated that [...] authorities are well aware of the Applicant's location in [...], but that his [...] nationality - confirmed by the NCB of [...] - renders his extradition impossible from this country, since the [...] of [...] prohibits the extradition of nationals. Therefore, no extradition request has been transmitted to [...] authorities, and the [...] authorities have only transmitted mutual legal assistance requests to ensure proper transmission of summons and procedural documents to the Applicant.
36. The NCB of [...] confirmed that it is committed to request the Applicant's provisional arrest and subsequent extradition to [...] from any other country where he would later be located, and where extradition would be a legally available option.

c) Findings of the Commission

37. The Commission first recalled that the purpose of a red notice is not only to locate a person, but also to request his/her provisional arrest in view of extradition. In this regard, the fact that the Applicant's location in [...] is known to [...] authorities does not undermine as such the lawfulness of the Red Notice.
38. However, INTERPOL's rules require that the requesting NCB takes appropriate step to achieve the purpose of the notice, i.e. to seek the arrest in view of extradition of the individual concerned, to transmit the necessary documents once the person is detained, or that it provides reasonable grounds for the lack of action of its country. In the present case, the NCB of [...] has indicated that since the Applicant's [...] nationality has been confirmed, it has not transmitted any extradition request to [...] authorities, which are legally prohibited from extraditing their own nationals.
39. Likewise, the NCB of [...] indicated that [...] authorities have attempted to nonetheless pursue their cooperation efforts by transmitting mutual legal assistance requests to their [...] counterparts. Moreover, renewed assurances have been transmitted by the NCB of [...] that it would request extradition from any country where the Applicant would be later found further to Article 84 of INTERPOL's rules on the processing of data.
40. The Commission then paid attention to the decision to deny the extradition of [...] adopted by [...] judicial authorities, and to its potential consequences on the Applicant's own situation. First, it noted that the fact that the criminal acts concerned are no longer prosecutable in [...] due to national statute of limitations does not in itself impact the compliance of the Red Notice, since the statute of limitation is suspended in the country source of the data and since other INTERPOL member countries may still be able to initiate extradition proceedings for these acts under their own national legislations. Moreover, it appears from the decision that [...] judicial authorities also declined to extradite [...] due to the absence of an applicable extradition instrument in force at the time of the alleged commission of the crimes. The Commission noted that this ground for refusal of an extradition request is country-specific, and that it does not represent a determination on the merits of the request nor bear consequences as to the overall compliance of the related data with INTERPOL's rules.
41. In this context, the Commission found that the decision adopted by [...] judicial authorities to refuse the extradition of [...], alleged accomplice of the Applicant in the same criminal case, does not



preclude the possibility that the Red Notice under study can still serve its purpose and lead to the arrest and subsequent extradition of the Applicant to [...].

C. Remaining contentions

42. The Commission recalled that in studying a request it reviews all of the Applicant's arguments, except when irrelevant.

[...]

FOR THESE REASONS, THE COMMISSION

Decides that the data challenged are compliant with INTERPOL's rules applicable to the processing of personal data, subject to the following update of the Applicant's file:

⇒ any reference to the charge of "contraband", for which the criminal prosecution has been terminated by [...] judicial authorities, shall be removed.
