EU Double Jeopardy Ruling May Complicate US Extraditions

By **Gabrielle Friedman** (January 24, 2023)

Gabrielle Friedman

Federal prosecutors' recent fraud indictment of Bahamas-based FTX founder Samuel Bankman-Fried demonstrates that transnational criminal investigation is becoming the rule rather than the exception.

The extradition of individuals from abroad, like Bankman-Fried, to face charges in the U.S. is therefore an increasingly important U.S. law enforcement tool.

Ironically, a recent judgment by the European Court of Justice may make it harder to effect certain extraditions from the European Union.

It suggests that the EU may be moving toward becoming an extradition-free zone for certain individuals. The case has not received much attention in the U.S., although it should.

This article explores how the ECJ's Oct. 28, 2022, judgment in Generalstaatsanwaltschaft München v. HF[1] could affect U.S. efforts to extradite persons who have already resolved criminal charges on the merits in any EU member state for conduct also under investigation by American authorities.

Germany v. HF is the latest in a line of ECJ cases defining the extent of double jeopardy protections in the EU. It is notable as the clearest articulation yet of the double jeopardy rule preventing an EU member state from extraditing a defendant to the U.S. if that defendant has reached final resolution on the merits of criminal charges anywhere in the EU based on the same set of facts.

The decision further states that the EU-wide double jeopardy protection applies regardless of the citizenship of the defendant, or the defendant's immigration status in the EU.

The Case

The ECJ is the transnational court of last recourse for the interpretation of EU law throughout the 27 member states of the EU.[2]

In Germany v. HF, the Grand Chamber of the ECJ interpreted EU law on double jeopardy, or ne bis in idem,[3] in connection with an extradition case pending before a German court.

HF, a non-EU citizen,[4] had been arrested in Germany in January 2022 pursuant to an Interpol red notice based on a 2018 indictment in the U.S. District Court for the District of Columbia.[5]

The U.S. prosecutors charged Racketeer Influenced and Corrupt Organizations Act conspiracy as well as bank and wire fraud conspiracy for computer hacking conduct between the years 2008 and 2013.

At the time of the German arrest in 2022, HF had already been tried and convicted and completed his sentence in EU member-state Slovenia for the Slovenian offense of attacking information systems.

When the U.S. sought to extradite HF from Slovenia in 2020, the Slovenian extradition court denied the request based on double jeopardy because it found that the U.S. charges were based in part on the identical conduct as the charges on which HF was convicted in Slovenia.

HF's trip to Germany thus appeared to give the U.S. a second bite at the apple, and possibly a successful one. That is because Germany's bilateral extradition treaty with the U.S. bars extradition on double jeopardy grounds only if Germany had previously tried the defendant on the same facts,[6] and HF had not been tried in Germany.

HF, represented by German counsel Sören Schomburg, argued that the EU law of double jeopardy prevented extradition.

The Higher Regional Court of Munich and the German state prosecutors took the position that HF's extradition is required under the bilateral German-U.S. treaty and German law.

However, EU-member state courts are also bound to comply with EU law. The Munich court requested an emergency preliminary ruling from the ECJ on the question of whether EU law on double jeopardy would prevent HF's extradition to the U.S. in spite of the bilateral treaty that required it.[7]

The German prosecutor argued that "the proper functioning of justice and the effectiveness of criminal prosecutions" required that Germany meet its obligation under its extradition treaty with the U.S.[8]

While the U.S. did not appear in the ECJ litigation, consistent with standard practice, it seems likely that a U.S. authority seeking to extradite would agree with the German prosecutor's position that HF's extradition is required.

After all, the U.S. Department of State had duly negotiated the bilateral extradition treaty with Germany that barred extradition on double jeopardy grounds only if Germany had previously tried the defendant to conclusion. Moreover, the U.S. is actively seeking this defendant's extradition.

The ECJ's Decision

The ECJ's judgment defeated any hope of HF's quick extradition to the U.S. The ECJ held that it would violate EU double jeopardy protections to extradite HF because he had been convicted in member-state Slovenia on charges based on the same facts.

The ECJ further instructed the Munich court to apply EU law, following the accepted principle that when there is a conflict between EU and national law, EU law takes primacy.

As a result, the double jeopardy provision in the bilateral treaty negotiated by the U.S. State Department with Germany has been superseded by the ECJ ruling. The same can likely be expected of any other similar bilateral treaties the U.S. has negotiated with other EU member states.

The HF decision's animating logic is based on comity among EU states with respect to mutual recognition of criminal judgments of other member states.

The ECJ's opinion is based on foundational treaties of the EU — the EU Charter[9] and the Convention Implementing the Schengen Agreement,[10] guaranteeing freedom of

movement among the EU states — and also takes note of the EU-U.S. Agreement on Extradition from 2003.

Of course, double jeopardy protections have long prevented the U.S. from extraditing certain defendants from European countries — but the rules are a patchwork. Each of the 27 EU member states has its own bilateral extradition treaty with the U.S.

Some treaties provide that double jeopardy prevents extradition only if the requested state had previously tried the defendant to conclusion or otherwise reached final resolution on the merits.[11] Other treaties are not explicit on that issue.[12] And still other treaties provide that double jeopardy prohibits extradition to the U.S. if any third country — not limited to EU member states — had already tried the defendant.[13]

Before the ECJ's judgment in HF, the strength of a double jeopardy defense to a U.S. extradition request depended on the EU member state the defendant found themselves in when arrested. For instance, the U.S. may have had an easier pathway to extradite a defendant from Germany than from Finland, based on their respective treaties.

In HF, the ECJ set a minimum double jeopardy protection that extends across all EU nations. In sum, a conviction anywhere in the EU now triggers double jeopardy protection everywhere in the EU vis-à-vis the U.S. and any other third country, as long as the facts are identical.

HF is the most recent in a string of ECJ decisions fleshing out the contours of EU double jeopardy protections. Earlier cases establish that one EU nation may extradite a citizen of another EU nation to a third country, like the U.S., only if the individual's home nation was given the opportunity to request extradition first. [14]

The ECJ's landmark 2021 ruling in WS v. Germany established that a person who had already been prosecuted to conclusion in a member state could not be arrested on an Interpol red notice requested by a non-EU nation if a final judicial decision established that the facts are identical in the EU and U.S. prosecutions.[15]

The HF decision extends that principle to third-country extraditions, even if the controlling bilateral extradition treaty is less protective of defendants.

The HF judgment is also notable because it reinforces that the double jeopardy protection under EU law is explicitly extended to persons of any nationality — not only citizens of EU member states — finding themselves within the borders of the EU. That would include, one assumes, U.S. citizens as well.

What This Means for Lawyers in the U.S. Representing EU-Based Clients

This opinion has a number of important implications. For example, the U.S. Department of Justice often relies on sealed indictments of foreign-based persons, particularly when that person lives in a country from which extradition is difficult or impossible. A sealed U.S. indictment combined with a nonpublic red notice can be an effective tool for apprehension of that person should they travel to a third country.

Now, at least for persons prosecuted in an EU member state on charges based on identical facts, the value of that U.S. law enforcement tool seems drastically reduced.

It is not extinguished, however. Uncertainty will remain, particularly with regard to whether

the facts in the EU and U.S. prosecutions are identical. That determination will presumably continue to be made by the court in the requested state presiding over the extradition proceeding.

For U.S. lawyers representing EU-based individuals subject to an extradition request, new possibilities for an acceptable resolution may open. For example, consider a defendant who may have exposure for wire fraud in the EU as well as the U.S. based on certain international transactions.

Following the logic of HF, it would seem that no EU member state could extradite that person to the U.S. for charges based on the same conduct if there is a final disposition in any EU member state of criminal charges based on that conduct.

The HF judgment may increase certain structural incentives for an individual to achieve resolution of criminal charges with an EU member state. It is generally understood that the U.S. has longer prison sentences and harsher conditions of confinement than many European countries.[16]

An EU-based defendant in a cross-border criminal case may be willing to abandon a U.S. resolution in favor of a less onerous resolution with an EU member state, particularly if an EU resolution means that the defendant can live out their days traveling within relatively expansive Schengen borders without fear of extradition to the U.S.

It is conceivable that in order to achieve finality and avoid the hazards of the U.S. justice system, a potential defendant — even a U.S. citizen — would seek out a final disposition of charges with an EU member state.

For example, in Germany, a resolution under Paragraph 153(a) of the Criminal Procedure Code — payment of a sum of money to discontinue a criminal proceeding — is available for certain white collar offenses and is considered a final disposition that triggers the double jeopardy protection.

That kind of resolution-shopping strategy is not without risk, however. EU law provides that a resolution triggers double jeopardy protection only when it: (1) is a merits-based determination, and (2) definitively bars further prosecution of the offender within the national legal system.[17]

In the criminal proceedings against Piotr Kossowski, for example, the ECJ ruled in 2016 that double jeopardy protection does not apply if an EU member state closes criminal proceedings absent a thorough investigation of the subject matter and decision on the merits.[18]

As demonstrated above, expansive double jeopardy protection articulated in HF could affect the resolution calculus for an individual target of a U.S. investigation if there is a parallel proceeding in an EU member state.

On the other hand, it could equally affect the calculus of prosecutors both at home and abroad. For example, it is possible that in an effort to limit resolution shopping by a defendant in a cross-border prosecution, the criminal authorities in the U.S. and an EU member state would increase cooperation and decide which legal system would ultimately try that particular defendant.

Risks and Uncertainty Remain

In practice, a key factor in the application of the double jeopardy bar is whether the charges in the prosecutions at issue are based on identical facts. Therein lies the uncertainty.

For example, would an EU-court extradite a defendant to the U.S. for charges based on conduct related to, but distinct from, the conduct at issue in the EU resolution?

Moreover, EU courts may not trust U.S. authorities to limit charges once a defendant is extradited to the U.S. The EU may not be willing to rely on representations from the U.S. that it will not add charges that would violate EU double jeopardy law.

This issue has arisen in litigation over the principle of specialty — the doctrine that the state seeking extradition must adhere to any limitations placed on prosecution by the surrendering country.

Significantly, under the law of many EU member states, an individual defendant has standing to assert that the doctrine of specialty has been violated by the requesting state if he is tried for crimes other than those for which he is extradited, or receives punishment beyond the punishment promised by the U.S. in connection with the extradition request.

In contrast, under U.S. law, only the surrendering nation has the right to assert a violation of the specialty doctrine.[19]

There have been situations where an EU member state declined extradition because the DOJ could not provide sufficient assurances regarding the offenses a defendant would be tried for in the U.S.[20]

One could imagine a parallel scenario in the context of double jeopardy. For example, an EU member state court might decline to extradite on the basis that it does not trust the U.S. to refrain from prosecuting the defendant for conduct that was barred by EU double jeopardy because it had already been the subject of final resolution in the EU.

The ECJ jurisprudence establishing an expansive double jeopardy protection could well be a sign of a broader difference between our legal cultures. The U.S. may simply be more willing than European countries to accept the possibility of successive prosecutions on the same facts by different sovereigns.[21]

At any rate, the ultimate impact of the HF opinion will be worked out over time by EU member state courts applying the law articulated by the ECJ. In the meantime, American lawyers with clients in EU member states would do well to consider how the evolution in EU law could expand the strategic horizon for their clients.

Gabrielle S. Friedman is a partner at Lankler Siffert & Wohl LLP.

[1] ECJ Judgment in Germany v. HF (C-435/22 PPU) (Oct. 28, 2022).

[2] The ECJ sits in Luxembourg and is composed of one judge from each EU member state. The member states of the EU are Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

[3] The English translation of the Latin ne bis in idem is "not twice in the same thing"—referring to the prohibition on successive prosecutions for the same offense conduct. It is similar in concept to the Double Jeopardy Clause of the Fifth Amendment to the US Constitution, which states: '[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

[4] Consistent with EU and German privacy protections, the ECJ judgment refers to the defendant only as HF. HF is a citizen of Serbia, which is not a member of the European Union.

[5] See Indictment in U.S. v. Skorjanc et al., 1:18-CR-00359-JDB (D.D.C., Dec. 4, 2018).

[6] USA- Germany Extradition Treaty (June 20, 1978) Article 8 ("Prior Jeopardy for Same Offense. Extradition shall not be granted when the person whose extradition is requested has been tried and discharged or punished with final and binding effect by the competent authorities of the Requested State for which is extradition is requested.")

[7] A reference for a preliminary ruling allows the national courts of EU Member States to ask the ECJ about the interpretation of EU law. The ECJ does not decide the dispute itself. It is for the national court to resolve the case in accordance with the Court's decision. See ECJ Press Release No. 175/22, Luxembourg (Oct. 28, 2022).

[8] ECJ Judgment in Germany v. HF, Par. 91 (C-435/22 PPU) (Oct. 28, 2022).

[9] Article 50 of the EU Charter provides that "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

[10] Article 54 of the CISA provides that "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."

[11] See, e.g., Germany-USA Extradition Treaty (June 20, 1978), TIAS 9785, and amendments.

[12] See, e.g., Greece-USA Extradition Treaty (May 6, 1931), 138 LNTS 293, and amendments.

[13] See, e.g., Spain- USA Extradition Treaty (May 29, 1970), TIAS 7136, and amendments; Finland-USA Extradition Treaty (June 11, 1976) TIAS 9626. And amendments.

[14] See ECJ Judgment in Pisciotti v. Bundesrepublik Deutschland, (C-191/16) (April 10, 2018), and ECJ Judgment in Petruhhin v. Latvijas Republikas Ģenerālprokuratūra (C-

182/15) (Sept. 6, 2016).

[15] ECJ Judgment in WS (C-505/19) (May 12, 2021). WS is a German citizen against whom criminal proceedings in Germany were discontinued upon payment of a sum of money, pursuant to German Criminal Procedure Code Par. 153(a). This is considered a final disposition on the merits of the case and thus sufficient to trigger a double jeopardy protection under certain circumstances defined in the opinion.

[16] See e.g., Joshua Kleinfeld, Two Cultures of Punishment, 68 Stan. L. Rev. 933 (2016) (noting that American criminal punishment has become more severe and European criminal punishment has become milder); James Q. Whitman. Harsh Justice: Criminal Justice and the Widening Divide Between America and Europe (2003).

[17] See e.g., ECJ Judgment in M (C-398/12) (June 5, 2014) ; ECJ Judgment in Turansky (C-491/07) (Dec. 22, 2008).

[18] ECJ Judgment in Kossowski (C-486/14) (June 29, 2016).

[19] See e.g., United States v. Suarez, 791 F.3d 363 (2d Cir. 2015); United States v. Garavito–Garcia, 827 F.3d 242, 247 (2d Cir. 2016); United States v. Barinas, 865 F.3d 99, 104-05 (2d Cir. 2017).

[20] For example, in 2016 Germany denied a US request to extradite a Swiss banker to the S.D.N.Y. after the German Constitutional Court found that there was no certainty that the US would observe the principle of specialty in not prosecuting the banker on certain charges deemed nonextraditable offenses under German law. See BVerfG, 2 BVR 175/16 (March 24, 2016).

[21] It is noteworthy that as Europe expands double jeopardy protections, the US Supreme Court recently confirmed that the doctrine of dual sovereignty permitting successive US state and federal prosecutions is an exception to the Double Jeopardy Clause of the Fifth Amendment. See Gamble v. U.S., 139 S.Ct. 1960 (2019).