



## DECISION OF THE COMMISSION

The Commission for the Control of INTERPOL's Files (the Commission) ...

Having deliberated in camera ... delivered the following Decision.

### I. PROCEDURE

1. On ..., the Applicant addressed a request to the Commission. Following the submission of all the required documents in accordance with Article 10 of the Operating Rules of the Commission, the request was found admissible, and the Commission informed him on ...
2. On ..., INTERPOL's National Central bureau (NCB) of Country A requested from INTERPOL's General Secretariat the publication of a red notice against the Applicant .... On ..., INTERPOL's General Secretariat informed the Commission of the NCB's request to register data in INTERPOL's files concerning the Applicant. ...
3. The NCB of Country A was initially consulted on the disclosure of the red notice request to the Applicant, in accordance with Article 5(e,4) of the Rules on the Control of Information and Access to INTERPOL's files (RCI).
4. As of 11 March 2017, the Commission continued the study of the Applicant's request under the Statute of the Commission (CCF Statute) which abrogated and replaced the RCI on that date. In accordance with Article 34(1) of the CCF Statute, the NCB of Country A was consulted on the arguments set forth in the complaint.
5. On ..., the Applicant addressed additional submissions to the Commission. Subsequently, the NCB of Country A was consulted again on the Applicant's claims and it provided answers to the Commission's queries on ....
6. Both the Applicant and the NCB of Country A were informed of the fact that the Commission would study this case during its ... session.

### II. FACTS

7. The Applicant is a national of Country B, and a prominent business executive.
8. He is the subject of a red notice request from the NCB of Country A for the charges of ..., on the basis of an arrest warrant issued in Country A on ....
9. The summary of the facts, as recorded in the red notice request, is the following: “”.

### III. THE APPLICANT'S REQUEST

10. The Applicant requests the deletion of the data concerning him registered in INTERPOL's files.
11. He contends in essence that:

- a) the case is of a predominantly political character;
- b) the case arises from a private dispute;
- c) the purpose of the requested red notice cannot be achieved;
- d) the proceedings are not lawful;

#### IV. APPLICABLE LEGAL FRAMEWORK

##### 12. 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.

##### 13. Political character :

- Article 3 of INTERPOL's Constitution states that it is "strictly forbidden for the Organization to undertake any intervention or activities of a political (...) character."
- Article 34 of INTERPOL's Rules on the Processing of Data (RPD) states the following:
  - 34(2): "(...) 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 in compliance with Article 3 of the Organization's Constitution".
  - 34(3): "To determine whether data comply with Article 3 of the Constitution, all relevant elements shall be examined, such as:
    - (a) nature of the offence, namely the charges and underlying facts;
    - (b) status of the persons concerned;
    - (c) identity of the source of the data;
    - (d) the position expressed by another National Central Bureau or another international entity;
    - (e) obligations under international law;
    - (f) implications for the neutrality of the Organization;
    - (g) the general context of the case."
- Resolution ref. AGN/20/RES/11 (1951) requires applying the predominance test (even if in the requesting country the facts amount to an offence against the ordinary law). It states that "(...) no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political (...) character is ever sent to the International Bureau or the NCBs, even if - in the requesting country - the facts amount to an offence against the ordinary law."
- INTERPOL's Repository of practice on Article 3 provides guidance on the application of Article 3 of INTERPOL's Constitution in a variety of circumstances.

##### 14. Conditions for the publication of red notices :

- Article 83.1(a,i) of INTERPOL's Rules on the Processing of Data 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.”

#### 15. Purpose of a red notice:

- Article 31 of INTERPOL’s Constitution states that a member country shall do all within its power which is compatible with the legislation of its country to participate diligently in INTERPOL’s activities.
- Article 10 of the RPD states that data shall be processed in the INTERPOL Information System for a specific purpose.
- 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.”

#### 16. Lawfulness of proceedings :

- Article 2(1) of INTERPOL’s Constitution states that the Organisation should “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”.
- Article 11(1) of the RPD provides that “data processing in the INTERPOL Information System should be authorized with due regard for the law applicable to the NCB, national entity or international entity and should respect the basic rights of the persons who are the subject of the cooperation, in accordance with Article 2 of the Organization’s Constitution and the Universal Declaration of Human Rights to which the said Article refers”.
- Article 11(3) of the RPD states that “*In conformity with Article 5 of the present Rules, prior to any recording of data in a police database, the National Central Bureau (...) shall ensure that (...) it is authorized to record (such) data pursuant to applicable national laws (...).*”
- Article 34(1) of the RPD states that “the National Central Bureau, national entity or international entity shall ensure that the data are in compliance with Article 2 of the Organization’s Constitution”.

- Article 83.2(b,v) of the RPD states that “Red notices may be published only when sufficient judicial data has been provided. Sufficient judicial data will be considered to include at least [...] reference to a valid arrest warrant or judicial decision having the same effect.”

## V. FINDINGS

17. In reviewing the issues raised, the Commission based its findings on information provided by the Applicant, the NCB concerned and INTERPOL’s General Secretariat.
18. The Commission treats the Applicant’s contentions in the order in which they are described in paragraph 11 above.

### A. Political character of the case

#### *a) The Applicant*

19. The Applicant claims that the proceedings against him are of a political character....In ..., Mr. X made an allegation ... that the former Minister Mr. Y had forced him, through his company A, to sell the company B to company C.
20. In exchange for the assistance of Mr. Y, it was alleged that company D, an entirely separate company, made investments some time later through its subsidiary company E at an inflated price in company F, which was then owned by Mr. Y’s brother (Mr. Z). According to the Applicant, the law enforcement agency suggested that the Board of Directors of company D conspired with the Board of Directors of company C to commit corruption acts...
21. He contends that the claims of corruption and coercion are entirely without merit, and that they were opportunely timed to exploit political developments in Country A. The Applicant indicates that the criminal proceedings initiated against him, as the director of company C and D at the time, are deeply linked to the political context. He claims that ...
22. He further claims that the law enforcement agency has never been fair or balanced in investigating the case. He argues that he has submitted detailed representations to the law enforcement agency, providing evidence contradicting the allegations, but that his arguments have not even been considered ... .
23. Eventually, he claims that the request for a red notice against him by the law enforcement agency is a retaliation for the arbitration proceedings initiated by companies D and E against Country A in the context of a bilateral investment treaty, for failure to accord fair and equitable treatment to the companies.

#### *b) The NCB Country A (NCB source of the data)*

24. In its reply, the NCB of Country A explained that the offences concerned were ordinary-law offences, and that the Applicant’s claim concerning the alleged national or regional political context of the case were meritless.
25. The NCB insisted on the fact that since the initiation of the investigations, all the major procedural steps of the criminal case brought by the law enforcement agency have been subject to legal review by the court and to monitoring from the Supreme Court of Country A.

**c) Findings of the Commission**

26. With respect to the assertion that the matter is of a political character, the Organization applies the predominance test, i.e., it evaluates all relevant information and pertinent elements, as provided for by the rules, to determine whether the offense is of a predominantly political character.
27. The rule reflected in Article 34(3) of the RPD requires analysis of all relevant factors, as to which the following appear to the Commission to be key in the present case:
  - the nature of the offense, namely the charges and underlying facts;
  - the status of the person concerned;
  - the implications for the neutrality of the Organization;
  - and the general context of the case.
28. In reviewing the applicable criteria under the predominance test, the Commission established first that the offenses as described in the red notice request and the judicial documents provided are of a common law character. The specific charges (...) are coherent with the underlying facts provided in the case summary and in additional supporting documents submitted by the law enforcement agency of Country A.
29. Under the applicable law of Country A (...) such charges can be held against a defendant who is not himself a public servant like the Applicant, as he is accused of abetting the commission of offences by a public servant as part of a criminal conspiracy. However, the elements demonstrating the possible effective and personal participation of the Applicant to the crimes concerned remain rather imprecise at this stage: indeed, the link between the Applicant and the alleged criminal activities, simply by virtue of his position in companies C and D, has not been fully clarified by the law enforcement agency of Country A.
30. The Commission also established that the Applicant is not himself a politician or former politician. However, the Commission highlighted that the Applicant had close links with the former Minister of ... Mr. Y.
31. The general context of the case also reveals that the Applicant is involved in arbitration proceedings brought by the companies D and E against the Country A's authorities in the context of a bilateral investment treaty (Case N° ...). In this connection, company D filed an application to the arbitral tribunal for interim measures to impede the continuation of criminal proceedings against the company and the Applicant.
32. The Commission noted that the arbitral tribunal decided that, pending a determination of the application, the Government of Country A was ordered not to take any actions which could frustrate the relief sought by Company D including in particular requesting the publication of Red Notices against the Applicant and/or requesting his extradition. This provisional decision has been later superseded by a subsequent one, whereby the Tribunal ordered Country A's authorities not to take any measures that could prevent the Applicant from continuing to assist Company D in the conduct of the arbitration.
33. The Commission considered that the decision of the arbitral tribunal only create obligations under international law for the parties to the arbitration, and in the present case, for Country A's authorities. Upon request from the Commission, the NCB of Country A clarified that it interpreted the decision of the arbitral tribunal as not prohibiting the issuance of a red notice and the initiation of extradition proceedings, as long as specific measures are taken to ensure that the Applicant can participate in the arbitration proceedings. Yet, the Commission held that the issuance of an arrest warrant against the Applicant on ..., *i.e* one day after the adoption of the provisional order by the arbitral tribunal, and the transmission of a red notice request to INTERPOL's General Secretariat by

the NCB of Country A on ... without any mention of the provisional order by the arbitral tribunal, have not been properly explained.

34. In view of all these elements, the Commission held that there may indeed be political elements around this case, and that maintaining the data challenged could have adverse implications for the neutrality of the Organization, in that the Organization would be perceived as facilitating politically motivated activities. However, it decided not to make a conclusive pronouncement on the compliance of the data challenged at this stage, and rather to study the Applicant's additional claims.

## **B. Private dispute**

### ***a) The Applicant***

35. According to the Applicant, the criminal case against him derives from a private commercial dispute in which Mr. X ..., making specific allegations of criminality only after it was apparent that his arbitration claim would fail.
36. Later in ..., Mr. X opportunely testified to the law enforcement agency, and following the initiation of a preliminary inquiry, tried to claim before the arbitral tribunal that he was coerced into signing the challenged agreement...
37. On ..., a few days after the arbitral award, the law enforcement agency published a report naming company D, E, F, and the Applicant among the accused, on the basis of evidence described as "reliable sources". Yet, the only evidence that the Applicant were complicit in these allegations was the one provided by Mr. X, which had just been dismissed by Country C's arbitral tribunal. Later Country A's law enforcement agency filed ... against the Applicant, without even mentioning the arbitration proceedings or the inconsistency between Mr. X's criminal allegations and his earlier civil claims.
38. The Applicant argues that the criminal case against him is only a continuation of the private commercial dispute with Mr. X, on the basis of evidence that has already been judged as unreliable, and that therefore the red notice requested by Country A is not compliant with Article 83.1(a.i) of the RPD.

### ***b) The NCB of Country A***

39. In response to the Applicant's claim, the NCB of Country A contested that the case was linked to a private dispute with Mr. X, and insisted on the general context of the ... case involving corruption schemes. The NCB also highlighted that the continuation of the case was connected to the Applicant's decision not to appear before the competent courts and to evade justice in Country A.

### ***c) Findings of the Commission***

40. With respect to the allegation that the conduct constitutes a private dispute, the Commission recalled that under Article 83.1(a.1) 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 or deriving from private disputes, unless the criminal activity is aimed at facilitating a serious crime or is suspected of being connected to organized crime*".
41. Thus, the publication of a red notice requires the NCB to provide sufficient facts that link the wanted individual to the charges against him, and that demonstrate that the Applicant's conduct is either not a private or administrative matter, or that it was aimed at facilitating serious criminality or organized crime.

42. The Commission held earlier (at paragraph 29) that the elements provided by the NCB of Country A in this regard remained imprecise, and that the link between the Applicant and the alleged criminal activities was not properly clarified. In the specific circumstances of this case, there is no indication that the alleged criminal activity was aimed at facilitating a serious crime or is suspected of being connected to organized crime, in the sense of Article 83.1 of the RPD.
43. The Commission concluded that the elements presented in relation to the genuine nature of the dispute raised additional questions as to the compliance of the data challenged with INTERPOL's rules. In view of the complexity of the case and the interdependence of arguments raised in relation to other legal issues, the Commission decided again not to make a conclusive pronouncement on the compliance of the data challenged at this stage, and to continue to study the Applicant's additional claims.

## **C. Lack of purpose**

### ***a) The Applicant***

44. The Applicant claims that the red notice requested by the NCB of Country A cannot serve its purpose, as Country A's authorities already have full knowledge of his location in Country B. He contends that Country A's requests to Country B for mutual legal assistance have been rejected due to intrinsic shortcomings of the criminal case which impeded international cooperation, and that therefore there is no prospect of any future extradition on the basis of a red notice.
45. The Applicant argues that Country A's court ordered that summons be issued for him, and that Country A's authorities tried to have such summons served to him through the cooperation of Country B's authorities. Country B's Attorney General addressed various questions to Country A's authorities to address legal concerns and did not receive an appropriate answer, until he eventually declined cooperation in a letter to Country A's authorities ....
46. Moreover, the Applicant argues that Country A's court held in its decision of ... that no fault could be attributed to him for the failure of Country B's authorities to serve the summons. Nevertheless, he claims that Country A's authorities sought the issuance of arrest warrants, and later of a red notice, without having dealt with the underlying concerns raised by Country B's Attorney General, and without completing the service of summons, in violation of ... . He concludes that as the requested red notice cannot serve its purpose, it should not be published further to Article 82 of the RPD.

### ***b) The NCB of Country A***

47. The NCB of Country A indicated that summons were issued by Country A's court on ...against several defendants in the case, including the Applicant, to secure their appearance during court sessions, but to no avail. These summons were sent to Country B, requesting that Country B's national authorities serve the summons to these defendants.
48. Country B's Attorney General sent requests for clarifications through diplomatic channels, which were transmitted to Country A's law enforcement agency .... On ..., the Country A's court issued new summons for the same defendants, which were sent along with the requested clarifications and a mutual legal assistance request through diplomatic channels on ....
49. On ..., Country A's court received a letter from the Attorney General of Country B declining the request to serve summons, as it considered that the test of dual criminality was not satisfied. The NCB of Country A insisted that the offences mentioned in the ... are punishable under Country B's law, and that it interpreted the facts of the case differently from Country B's Attorney General.

50. In addition, the NCB of Country A explained that pursuant to directions from the ... Court of Country A, notifications were published in two newspapers of Country B (“... ” and “...”), to inform the Applicant and the other defendants of the need for them to appear before Country A’s courts.
51. Eventually, the NCB of Country A stressed that Country A’s authorities have undertaken important efforts to properly serve summons to the Applicant, in order to respect procedural requirements, although the Applicant’s behaviour demonstrate that he is well aware of the judicial proceedings and that he deliberately chose not to participate and to evade from justice.

***c) Findings of the Commission***

52. 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 is known to Country A’s authorities does not undermine as such the lawfulness of the red notice. 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, or that it provides reasonable grounds for the lack of action of its country.
53. In the present case, the red notice has not yet been published, but the NCB of Country A requested its issuance, giving assurances further to Article 84 of the RPD that it would request extradition from any country where the Applicant would be later found. The information provided by the NCB of Country A highlight that its national authorities have taken steps to respect their obligations under applicable law: they may not have requested yet the extradition of the Applicant from his own country of nationality, but they have followed-up with Country B’s authorities once his location was confirmed and have attempted to have their summons served abroad through a mutual assistance request.
54. Now that Country B’s Attorney General has declined the mutual legal assistance request, underlining that the dual criminality criteria was not satisfied in this case, there remain very little prospects that the Applicant could be extradited from Country B to Country A. Yet, the Commission noted that Country A’s authorities have established their willingness to seek the Applicant’s extradition, wherever this would be a legally available option. The Commission held that the specific situation in Country B would not preclude Country A’s authorities from later requesting the extradition of the Applicant from a different country where he could be arrested, without making any determination on the relevance or the merits of the request, on the basis of a red notice.
55. Therefore, the Commission concluded that the Applicant’s claim that the requested red notice could not serve any purpose since his location is known and his extradition from Country B unlikely, cannot be upheld.

**D. Lack of lawfulness**

***a) The Applicant***

56. Eventually, the Applicant claims that on ..., a judge from Country A’s court issued a ruling in which he discharged all the accused in the case (Mr. Y, Mr. Z, company E, company F). Because the summons were not served to him and other defendants in Country B, their cases were severed from this decision, but it is fully and equally applicable to their situation, as it rules on the quality of the evidence, the procedural flaws, and the absence of criminal acts in the whole case.
57. On ..., the prosecutor who had appealed the decision withdrew his petition before the ... Court of Country A. Therefore, the Applicant contends that the entire case upon which the red notice is



requested has collapsed, and the NCB of Country A should have informed INTERPOL's General Secretariat accordingly.

58. The Applicant claims that Country A's law enforcement agency continues to oppose closing the case, and that it requested the issuance of a proclamation declaring the Applicant (and another defendant) as absconders. However, this application was rejected on ... by Country A's court ....
59. According to the Applicant, Country A's law enforcement agency is trying to keep the proceedings alive, on the technical ground that he must appear before the court, only to be discharged like the other accused. However, he argues that this is not a *bona fide* attempt to secure the presence of accused individuals. In his view, the above-quoted decision of the court demonstrates that Country A's authorities have tried to use INTERPOL's channels in order to circumvent the impossibility to serve summons, and despite the dismissal of the case on the merits.

**b) The NCB of Country A**

60. The NCB of Country A refuted the Applicant's claim that the case underlying the red notice has been dismissed. It insisted on the fact that the prosecutor has withdrawn his appeal petition before the ... Court of Country A against the discharge decision of the court, but only to file another one before the ... Court of Country A, out of considerations of jurisdictional competence. Therefore, the NCB highlighted that the discharge decision mentioned by the Applicants is not final, and that it is still under challenge before a higher court.
61. Moreover the NCB reiterated that although the court refused to proclaim the Applicant as absconder in its order dated ..., the *mala fide* of the Applicant is apparent as it can be clearly deduced from his application before the Commission that he is well aware of the proceedings in Country A and that he tries to avoid appearing before the competent courts.

**c) Findings of the Commission**

62. The Commission studied in detail the decision handed down ... by Country A's court, which discharges all the accused in the case, except for the Applicant and other defendants in Country B, whose situation is severed from the decision. The Commission acknowledged that this decision is not final, in the sense that it has been appealed before Country A's high jurisdiction of appeal. Yet it held that, being the latest available judicial decision on the case, adopted by the same court who initially issued the arrest warrant which forms the basis of the red notice request, its informed findings bear a strong weight on the case.
63. The Commission noted that this decision, although not strictly applicable to the Applicant's situation, which has been separated out of technical grounds linked with the non-service of summons in Country B, strongly denounces major procedural flaws during the investigation phase and severely dismisses the merits of the prosecution case. It concludes that no misconduct can be attributed to the then-Minister Y, that the allegation of bribes through company D's investment in company F are unfounded, and that no favours have been granted to company C following the acquisition of company D. The thorough analysis of the defects of the criminal case and of the evidentiary basis, leading to the discharge of all the accused in the case, cannot be disregarded by the Commission especially as it coincides with various limbs of the Applicant's claims.
64. In view of all these elements, and recalling the prior doubts identified on the link of the case with a private dispute, as well as the political elements surrounding the proceedings, the Commission concluded that on the balance, the data challenged are not compliant with INTERPOL's rules applicable to the processing of personal data.

**FOR THESE REASONS, THE COMMISSION**

1. Decides that the data challenged are not compliant with INTERPOL's rules applicable to the processing of personal data, and that they shall be deleted from INTERPOL's files.

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