



INSIGHT

# LEGALITY, DOUBLE CRIMINALITY AND EFFECTIVENESS IN THE EUROPEAN ARREST WARRANT SYSTEM: THE COURT OF JUSTICE IN *X*

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**ABSTRACT:** In *X* (judgment of 3 March 2020, case C-717/18, *X* (*Mandat d'arrêt européen – Double in-crimination*)), the Court of Justice has clarified the implications of a reform determining the increase of the penalty scales on the lifting the double criminality check pursuant to Art. 2, para. 2, of Framework Decision 2002/584/JHA, where an European Arrest Warrant is pending. While analysing the interpretative approach underpinning the reasoning of both the Court of Justice and the AG, the present *Insight* focuses on two key issues: the relationship between the EAW system and the *nullum crimen, nulla poena sine lege* principle, and the renewed importance of the EAW form for purposes of contextual interpretation of the Framework Decision. The concluding remarks provide some reflections on the principle of effectiveness in EAW matters.

**KEYWORDS:** judicial cooperation in criminal matters – mutual recognition – European Arrest Warrant – double criminality – principle of legality – effectiveness.

## I. INTRODUCTION

The Court of Justice has recently clarified its case law on the limits of the double criminality check and on the principle of legality in the European Arrest Warrant (EAW) system. The Court of Appeal of Ghent, Belgium, asked the Court of Justice which national substantive criminal law should apply for the purposes of Art. 2, para. 2, Framework Decision 2002/584/JHA on lifting the double criminality check, in case the relevant domestic legislation of the issuing State had been stiffened in the period between the final conviction and issuing of the EAW.

In principle, double criminality makes surrender conditional on the fact concerned being considered an offence by both the requesting and executing State's legislation. While a core aspect of any traditional extradition mechanisms, it is a residual component of the advanced system of surrender established by the EAW. In fact, according to Framework

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Decision 2002/584/JHA, this check is not required where the offence that the warrant refers to is included in the list in Art. 2, para. 3, and the maximum penalty provided *in abstracto* complies with the threshold in para. 2. The relationship between double criminality, principle of legality and the EAW system has been one of the driving legal issues since the earliest applications of the Framework Decision. In fact, while surrender under EAW aims for swift cooperation in criminal matters under the principle of mutual recognition,<sup>1</sup> double criminality “stems from a traditional concept of sovereignty, often linked [...] to the protection of a State’s own national values”.<sup>2</sup> Within the context of that clash, the case in question broaches an aspect related to the grounds of the double criminality check which has not been previously clarified by the Court’s case-law. The present *Insight* frames the *X* case within the previous case-law on the principle of legality and double criminality and discusses the further clarifications provided by the Court.

Interestingly enough, since the disputed EAW was issued by a Spanish judicial authority, aiming for the execution of a conviction for a terrorism-related offence, the case at hand establishes a new chapter of the lengthy EAW and counter-terrorism Spanish saga.<sup>3</sup> In that view, with the limits of double incrimination once more at stake, the case analysed may be regarded as a further step forward after the concerns raised by the *Puigdemont* case.<sup>4</sup>

<sup>1</sup> Among many: V. MITSILEGAS, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, in *Common Market Law Review*, 2006, p. 1284 *et seq.*; S. MONTALDO, *On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice*, in *European Papers*, 2016, Vol. 1, no. 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 971 *et seq.*

<sup>2</sup> L. BACHMAIER, *European Arrest Warrant, Double Criminality and Mutual Recognition: a Much Debated Case*, in *European Criminal Law Review*, 2018, p. 155. The institution of an EU competence over the regulation of judicial cooperation in criminal matters constitutes a crucial transfer of powers, since “classical judicial cooperation, and extradition in particular, is a legal institution that regulates relations between sovereign States, based on the principle of equality between States. [...] The situation is very different within the European Area of Justice. The States no longer cooperate as sovereigns [...] the political phase of cooperation disappears, and an exclusively judicial mechanism is established” (A. NIETO MARTÍN, *The Foundations of Mutual Recognition and the Meaning of Dual Criminality*, in *European Criminal Law Review*, 2018, p. 160).

<sup>3</sup> Spain has noticeably exploited EAWs to seek the surrender of offenders linked to the ETA terrorism. See: M. JIMENO-BULNES, *Country Report – Spain*, in A. GÓRSKI, P. HOFMAŃSKI (eds), *The European Arrest Warrant and Its Implementation in the Member States of the European Union*, Warszawa: Wydawnictwo C.H. Beck, 2008, p. 362.

<sup>4</sup> The surrender of Mr. Puigdemont was based on charges of rebellion and embezzlement, two offences excluded from the list enshrined in Art. 2, para. 3, Framework Decision 2002/584/JHA. In particular, the executing authority ruled out the request since the German offence of “high treason”, similar to the Spanish one, requires violence which could deem to the State to capitulate, a requirement which could not apply to the Catalanian case. The decision at stake has been highly criticized because it seems to contradict the Court of Justice ruling in *Grundza* case, according to which the only relevant aspect to have the double criminality requirement fulfilled is the acts giving rise to the sentence imposed in the issuing State also constitute an offence in the executing State (Court of Justice, judgment of the 11 January 2017, case C-289/15, *Grundza*, para. 34) See, *inter alia*: F. RUIZ YAMUZA, *CJEU case law on double criminality. The Grundza-Piotrowski paradox?*, in *ERA Forum*, 2019, p. 465 *et seq.*; S. BRAUM, *The Carles Puigdemont Case; Europe’s Criminal Law in the Crisis of Confidence*, in *German Law Journal*, 2018 p. 1349 *et seq.*; M.M. DE MORALES ROMERO, *Doble incriminación a examen*.

## II. FACTS OF THE CASE AND KEY LEGAL ISSUES

The case referred to the Court originates from the execution of a penalty imposed on Mr. X, convicted on 21 February 2017 by the National High Court of Spain. He was found guilty of – *inter alia* – “glorification of terrorism and humiliation of the victims of terrorism” and was eventually handed a three years and six months custodial sentence.<sup>5</sup> Since the facts in question date back to 2012 and 2013, the Spanish Court applied the criminal provisions in force at the time of the offence, which provided a maximum penalty of two years imprisonment. The substantive criminal provision was later reformed in 2015 and the relevant penalty threshold was increased to three years detention.<sup>6</sup> Once the judgment became final, an EAW was issued to seek his surrender from the Belgian authorities. Executing authority Ghent’s Court of First Instance issued its first decision refusing surrender due to lack of double criminality.<sup>7</sup>

Following the appeal lodged by the Belgian prosecution service, Ghent’s Indictment Chamber of the Court of Appeal reconsidered the previous order. In fact, the latter judicial authority was concerned about the version of the issuing State’s criminal provision to be taken into consideration for the purposes of avoiding the double criminality check. While Art. 2, para. 2, of the Framework Decision requires at least a maximum of 3 years imprisonment *in abstracto*,<sup>8</sup> the Spanish law in force at the time of the offence set forth a maximum detention of just two years. Since the reformed criminal provision complied with the threshold mentioned *supra*, the Belgian judicial authority referred a question to the Court of Justice for preliminary reference, seeking to ascertain if Art. 2, para. 2, of the Framework Decision should be construed as to “take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case [...] or the law of the issuing Member State in the version in force at the date of issue of that arrest warrant”.<sup>9</sup>

While providing an answer to this issue, the preliminary ruling in question tackles two controversial issues when applying the EAW Framework Decision. Firstly, it clarifies the relationship between lifting the double criminality assessment and the principle of legality, enshrined in *inter alia* in Art. 49, para. 1, of the Charter of Fundamental Rights of the European Union. Secondly, it further defines the legal value of the form annexed

*Sobre el caso Puigdemont y otros supuestos (Double Criminality under Review: On the Puigdemont Case and Other Situations)*, in *InDret*, 2019; D. SARMIENTO, *The Strange (German) Case of Mr. Puigdemont’s European Arrest Warrant*, in *Verfassungsblog*, [verfassungsblog.de](http://verfassungsblog.de).

<sup>5</sup> Opinion of AG Bobek delivered on 26 November 2019, case C-717/18, *X (Mandat d’arrêt européen – Double incrimination)*, para. 6.

<sup>6</sup> Court of Justice, judgment of 3 March 2020, case C-717/18, *X (Mandat d’arrêt européen – Double incrimination)*, paras 9-10.

<sup>7</sup> Opinion of AG Bobek, *X (Mandat d’arrêt européen – Double incrimination)*, cit., para. 14.

<sup>8</sup> See note no. 2.

<sup>9</sup> *X (Mandat d’arrêt européen – Double incrimination)*, cit., para. 16.

when interpreting the Framework Decision. The subsequent sections will go into these issues in more depth, analysing both the reasoning of the Court and the AG.

### III. THE SCOPE OF THE PRINCIPLE OF LEGALITY REGARDING DOUBLE CRIMINALITY

In the aftermath of the EAW Framework Decision being adopted, early commentators questioned the compatibility of lifting the double criminality check with the principle of legality. They contended that the system would have led to surrendering a requested person even in cases where the relevant conducts were not criminalised in the executing State.<sup>10</sup> In their view, this outcome contrasted with the very basis of the double criminality guarantee: “the meaning of double criminality is none other than to leave out of cooperation facts that could in no way be considered criminal under the law of the executing State, because they do not entail any kind of legal censure”.<sup>11</sup>

The Court of Justice was soon asked to take a stance on this topic in the well-known *Advocaten voor de Wereld* case. The Court ruled that for the purposes of avoiding the double criminality check, only the law of the issuing State must be taken into consideration for the purposes of defining the offences and penalties.<sup>12</sup> In fact, since “the Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract”.<sup>13</sup> It followed that the *nullum crimen, nulla poena sine lege* principle does not apply to the EAW system itself, but rather to the national criminal provisions.<sup>14</sup> This reasoning is coherent with settled case-law of the European Court of Human Rights, which consistently holds that international instruments of judicial cooperation fall outside the scope of application of the principle of legality enshrined in Art. 7, para. 1, of the Convention.<sup>15</sup> In fact, AG

<sup>10</sup> On the debate and related arguments concerning the lifting of double criminality in the EAW system, see: D. FLORE, *Reconnaissance Mutuelle, Double Incrimination et Territorialité*, in G. DE KERCHOVE, A. WEYEMBERGH (eds), *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne*, Bruxelles: Éditions de l'Université de Bruxelles, 2001, p. 65 *et seq.* It is also reported that such concerns resulted in a slowdown of the negotiation for the adoption of further judicial cooperation instruments. See F. GEYER, *European Arrest Warrant: Court of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05*, in *European Constitutional Law Review*, 2008, p. 151 *et seq.*

<sup>11</sup> A. NIETO MARTÍN, *The Foundations of Mutual Recognition* cit., p. 163.

<sup>12</sup> Court of Justice, judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld* [GC], para. 52.

<sup>13</sup> *Ibidem.*

<sup>14</sup> *Ibidem*, para. 54. On that point, see: F. GEYER, *European arrest warrant*, cit., p. 156; E. CLOOTS, *Germes of pluralist judicial adjudication: Advocaten voor de Wereld and other references from the Belgian Constitutional Court*, in *Common Market Law Review*, 2010, p. 657 *et seq.*; A. NIETO MARTÍN, *The Foundations of Mutual Recognition*, cit., p. 160; O. POLLICINO, *European arrest warrant and constitutional principles of the Member States: a case law-based outline in the attempt to strike the right balance between interacting legal systems*, in *German Law Journal*, 2008, p. 1340 *et seq.*

<sup>15</sup> Among several case law of the European Court, it is worthy to recall: European Court of Human Rights, decision of 27 June 2006, no. 28578/03, *Szabó v. Sweden*; decision of 5 July 2007, no. 69917/01, *Sac-*

Bobek emphasised in *X* that “the definition of the offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State”.<sup>16</sup> Therefore, while providing a different treatment for surrendering the case in question, considering both the versions of the criminal law concerned would not entail a violation of the mentioned principle.<sup>17</sup> AG Bobek’s reasoning was implicitly upheld by the Court and is crucial to the ruling, since acknowledging the relevance of the principle of legality in the case at stake would have prevented the Court to provide a univocal answer to the question. In fact, a legality-based argument would have led to prioritising the law in force at the time the offence was committed. In a different case however where the maximum penalty had been lowered under the threshold provided by Art. 2, para. 2, of the Framework Decision, the retroactivity of the *lex mitior* would apply, resulting in the reformed provision having to be considered.<sup>18</sup> These findings would have led to a more complex or at least twofold answer from the Court of Justice, while questioning the foundations of the previous case-law on the matter.

#### IV. IDENTIFYING THE APPLICABLE LAW ACCORDING TO THE CONTEXT: THE INTERPRETATIVE VALUE OF THE EAW FORM

Ruling out the principle of legality, the Court framed the case in terms of legal certainty and effectiveness of the EAW system. The reasoning which led to the solution of the preliminary question builds on the axiom that an unequivocal and accessible identification of the relevant law of the issuing State secures the swift functioning of the procedure. “[T]he executing judicial authority must be able to rely, in the application of Art. 2, para. 2, of Framework Decision 2002/584, on the information on the length of the sen-

*coccia v. Austria*. The mentioned jurisprudence could be subsumed to the well-established distinction between “the imposition” and the “enforcement of the penalty”, since the European Court consistently held that Art. 7 ECHR does not apply to the latter. That finding has been reaffirmed also in the context of the EAW in *Monedero Angora v. Spain* (European Court of Human Rights, decision of 7 October 2008, no. 41138/05, *Monedero Angora v. Spain*). The same distinction is also relevant for the scope of application of Art. 6 of the Convention. See: D.J. HARRIS, M. O’BOYLE, E. BATES, C. BUCKLEY, *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2014, p. 373; C.C. MURPHY, *The Principle of Legality in Criminal Law Under the ECHR*, in *European Human Rights Law Review*, 2010, p. 192 *et seq.*

<sup>16</sup> Opinion of AG Bobek, *X (Mandat d’arrêt européen – Double incrimination)*, cit., para. 99.

<sup>17</sup> *Ibidem*, para. 100.

<sup>18</sup> That principle is enshrined as part of the legality principle in the latter period of Art. 49, para. 1, of the Charter, while recognised also by the ECtHR case-law in the context of Art. 7 of the Convention. The leading case in that regard is *Scoppola v. Italy* (European Court of Human Rights, judgment of 17 September 2009, no. 10249/03, *Scoppola v. Italy*, para. 109) whereby the Court reverted a previous finding by the European Commission of Human Rights which excluded that Art. 7, para. 1, of the Convention implicitly entailed the retroactivity of the *lex mitior* (European Commission of Human Rights, decision of 6 March 1978, no. 7900/77, *X v. Germany*).

tence set out in the European arrest warrant itself, in accordance with the form contained in the annex to that Framework Decision".<sup>19</sup>

Actually, this form provided the Court of Justice with an essential argument as a means for a contextual interpretation of the EAW Framework Decision.<sup>20</sup> In fact, the Court had already emphasised that the structure and wording of the EAW form must be taken into account when interpreting the Framework Decision.<sup>21</sup>

In line with this approach and because of the lack of clear textual indications in the Framework Decision,<sup>22</sup> the Court and AG Bobek found that the structure of the form can disclose a strict interconnection between the first two paragraphs of Art. 2 of the Framework Decision. By setting a minimum length of the detention imposed in each case, Art. 2, para. 1, certainly refers to the criminal law in force at the time of the offence. Since the information in both paras 1 and 2 of Art. 2 should be entered in the same section of the form,<sup>23</sup> it would be reasonable to consider that para. 2 also actually refers to the same version of the criminal law concerned, namely the one applicable to the national criminal proceeding.<sup>24</sup> A different solution could give rise to operational difficulties for the executing authority when identifying the national law in force at the time the warrant was issued, thus creating legal uncertainty and impairing the obligation to deal with the procedure as a matter of urgency.<sup>25</sup> Following these arguments, the Court concluded that Art. 2, para. 2, of the Framework Decision should be con-

<sup>19</sup> *X (Mandat d'arrêt européen – Double incrimination)*, cit., para. 37.

<sup>20</sup> Contextual interpretation assumes that the EU legislator is a rational actor, which has provided a complete and consistent legal order. Following that, "each provision of EU law must be interpreted in a way that guarantees that there is no conflict between the individual provision and the general scheme of which it is part". See K. LENAERTS, J.A. GUTIÉRREZ-FONS, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, in *Columbia Journal of European Law*, 2013, p. 17; for some references, see also *Ibidem*, p. 16-23).

<sup>21</sup> Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*, para. 44. On that point, see: G. TUMANISHVILI, G. MIRIANASHVILI, *Normative and Accessory Grounds for the Non-Execution of the European Arrest Warrant*, in *TSU Journal of Law*, 2018, p. 137. The legal value of the form concerned has also been underlined in more general terms by the Court in *Piotrowski* and *IK*: Court of Justice: judgment of 23 January 2018, case C-367/16, *Piotrowski*, para. 47; judgment of 6 December 2018, case C-551/18 PPU, *IK (Enforcement of an additional sentence)*, para. 49.

<sup>22</sup> *X (Mandat d'arrêt européen – Double incrimination)*, cit., paras 18-20; Opinion of AG Bobek, *X (Mandat d'arrêt européen – Double incrimination)*, cit., paras 30-38.

<sup>23</sup> Namely Section (c), which requires to provide the "maximum length of the custodial sentence or detention order which may be imposed for the offence(s) together with the "length of the custodial sentence or detention order imposed".

<sup>24</sup> *X (Mandat d'arrêt européen – Double incrimination)*, cit., para. 31.

<sup>25</sup> *Ibidem*, para. 37. That finding is one of the most recalled one in the Court's case-law. Among many, the following cases shall be recalled: *IK (Exécution d'une peine complémentaire)*, cit., para. 50; Court of Justice, judgment of 25 July 2018, case C-220/18 PPU, *Generalstaatsanwaltschaft (Conditions de détention en Hongrie)*, para. 63.

strued as referring to the law of the issuing Member State in the version applicable to the facts covered by the warrant.

## V. CONCLUDING REMARKS

The ruling in *X* solved quite a technical issue, albeit crucial for the functioning of the EAW system. Despite the centrality of lifting the double criminality check, the Court of Justice had not yet had the opportunity to determine which version of the national law should be taken into account in the event of a reform *in itinere*. The solution backed by the Court, namely the preference for the substantive criminal provision in force at the time of the offence, is to be welcomed in terms of legal certainty and effectiveness of the surrender mechanism. The judgment to the EAW form also enhanced a contextual understanding of the Framework Decision which is pivotal for reinforcing the overall effectiveness of the mechanism. In fact, the Court has once again emphasized the decisive value of the information to be submitted to the executing authority, also considering them for the purposes of interpreting the Framework Decision.

One of the driving factors emerging from the ruling is the need to guarantee the effectiveness of the EAW system, so the case in question also had the merit to indicate what the latter aspect actually implies. As emphasised by AG Bobek, a distinction should be made between “individual effectiveness” and “structural effectiveness”. The former reflects the need to ensure the actual surrender of the requested person as a result of the mechanism, whereas the latter exclusively refers to the functioning of the procedure as a whole.<sup>26</sup> Given that, the case at stake properly demonstrated that the effectiveness of the EAW system mainly corresponds to a swift and prompt examination of the request by the executing authority, without any reference to the outcome of each single procedure. Such clarification enlightened many concerns on the extent of the effectiveness principle which often stemmed from arguments submitted by parties in the EAW context.

<sup>26</sup> Opinion of AG Bobek, *X (Mandat d'arrêt européen – Double incrimination)*, cit., para. 86.

