*Lorena Bachmaier**

European Arrest Warrant, Double Criminality and Mutual Recognition: A Much Debated Case

Abstract

On March 2018 the Spanish Supreme Court issued a European Arrest Warrant for the surrender of Puigdemont to be tried in Spain for grave offences against the constitutional order. In a preliminary decision the competent judicial authority in Germany found that the absence of double criminality should lead to the refusal of the EAW. This decision was confirmed by definitive decision of 12 July 2018. This paper questions the reasons for keeping a strict double criminality test in the European Area of Freedom Security and Justice (AFSJ), where the principle of mutual recognition should be "the cornerstone" of the judicial cooperation. It will be argued that a too strict application of the double criminality requirement in the realm of the EAW is contrary to the objectives set out in Article 67 and 82 of the TFUE, while it is not necessarily justified on grounds of protection of human rights.

I. Introduction

It is not usual that the functioning of a cooperation instrument in criminal matters such as the EAW is discussed on the front pages of the press in several EU Member States. However, the case regarding the European Arrest Warrant (EAW) issued against Catalan politician Carles Puigdemont accused of rebellion and embezzlement of public funds has gained so much notoriety that it has exceeded the scope of academic debates to find its place in the forefront of public opinion. Without getting into the details of the precise facts and without aiming to analyse development of the proceedings and all the other decisions already taken in the different EAW proceedings before the Belgian and the German courts, I will focus on the issue of "mutual trust" and the principle of mutual recognition in connection with the double criminality check.[1] Aside from any

* Full Professor, Faculty of Law, Complutense University Madrid. E-mail: L.Bachmaier@der.ucm.es.

1 I will not address other EAWs issued against other persons also indicted for the same offences as Carles Puigdemont, pending before the courts in Belgium and in Scotland. The decision adopted so far by the Belgian authorities –refusing the enforcement of the EAWs based on formal grounds, stating that the EAW is not based on a detention order- could have been easily

DOI: 10.5771/2193-5505-2018-2-152

political consideration of the facts that led to the criminal prosecution of the defendant in this case, and without aiming to criticise any concrete judicial decision of the courts, my purpose is to discuss the reasons for keeping a strict double criminality test in the European Area of Freedom Security and Justice (AFSJ), where the principle of mutual recognition should be "the cornerstone" of the judicial cooperation. Further it should be considered if a strict application of the double criminality check can serve to enhance the mutual trust or rather can contribute to create more distrust among the Member States.

II. Double criminality check and mutual recognition principle

On 21st March 2018 the Spanish Supreme Court issued a EAW for the surrender of Puigdemont to be tried in Spain –after he had fled from the Spanish territory to avoid detention in October 2017– while he was temporarily staying in Finland. Before the EAW could be enforced in Finland –and perhaps for avoiding being detained at the airport or while boarding the ferry to cross to Sweden– the defendant drove by night from Helsinki to Lapland, entered Sweden through the Northern border,[2] crossed Denmark, and shortly after entering into German territory was detained by German law enforcement authorities. The competent Court for deciding on the enforcement of the EAW was the *Oberlandesgericht* of the *Land* Schleswig Holstein.[3] This Court issued on 5th April 2018 a decision rejecting the admissibility of the EAW for the offence of rebellion, stating at that preliminary stage of the proceedings –and in a surprisingly short time–[4] that the double criminality requirement was not complied with. This decision was finally confirmed on 12 July 2018 and allows the enforcement of the EAW only for the offence of embezzlement (*Veruntreuung öffentlicher Gelder*).

The crucial point of the execution of this EAW in Germany revolves around the question of the double criminality requirement. In the FD EAW for offences other than those covered by the list of 32 in Article 2(2),[5] "the surrender may be subject to

overcome via consultations, because an *auto de procesamiento* confirming the *auto de prisión* amounts to a detention order. It seems that the Court has applied the case law of the ECJ, in the case 1.6.2016, C-241/15 *Niculaie Aurel Bob-Dogi* (ECLI:EU:C:2016:385) in an exacerbating way, definitely not in line with the obligation to foster the cooperation.

2 Information published by the Spanish news in "El Confidencial", accessible at: https://www.elconfidencial.com/espana/2018-04-06/puigdemont-laponia-carretera-finlandia_1546090/, (last accessed 8.5.2018).

3 Following Articles 13 (subject jurisdiction) and 14 (territorial jurisdiction) of the German Law for international cooperation in criminal matters (*Gesetz über die internationale Rechtshilfe in Strafsachen* (IRG), of 23.12.1982, as of 27.8.2017.

4 Since the arrest took place on Sunday 25 March, and the decision was issued on 5 April, it took only 10 days –including Saturday and Sunday, in principle non-working days- for the court to decide on such a relevant issue.

5 On the ECJ case law on EAWs see generally *L. Bachmaier*, "Cooperación judicial penal", in J.M. Beneyto Pérez et al (eds.), Colección Tratado de Derecho y Políticas de la Unión Europea, vol. VIII: Ciudadanía Europea y Espacio de Libertad, Seguridad y Justicia, Cizur Menor, 2016, pp. 329-386, p.333 ff.

the condition" that the acts for which the EAW has been issued constitute an offence in the executing State. The FD allows the Member States to undertake such a check (Article 2(4)), and most Member States have implemented it as a mandatory requirement.[6]

The offence of rebellion is not included in the list of 32 crimes that do not require the double criminality test. Therefore, according to its own national law, the German Court has to check whether such an unlawful act is present or not in the German legal order before deciding on extradition of a non-national and non-resident citizen to Spain. This is perfectly in accordance with the FD EAW and the German law. Moreover it is the duty of the German court to abide by the law.

I will not delve into the elements of the offence, nor analyse if the crime of rebellion and sedition under arts. 472 and 544 of the Spanish Criminal Code correspond with the crime of *Hochverrat* (treason) (Art. 81 of the German *Strafgesetzbuch, StGB*) or *Nötigung von Verfassungsorgane* (coercion upon constitutional bodies) provided under art. Article 105 of the German Criminal Code or *Landesfriedenbruch*.[7] According to the German practice, it is not enough for complying with the double criminality requirement in extradition cases that in both –issuing and executing– States there are equivalent criminal rules, but the acts have to be also punishable in the executing State: even if the offences were identical in their abstract form, it is considered that there is the need to check the existence of the double criminality following the criteria set in the German law and jurisprudence and thus analyse if the same acts would be punishable in Germany.

The issue at stake is how far this test should go, and therefore how to interpret the double criminality principle within the context of the factual examination of this EAW. Of course, the executing German authority has to check the double criminality requirement, but how in-depth should such a test be? What is the rationale behind con-

6 According to Article 81.4 the IRG the double criminality is not to be checked in the cases provided in the FD EAW, thus *senso contrario*, in all other cases it is a requirement that the judicial authorities need to check.

7 On the elements of these offences to the end of analysing if the requirement of the double criminality is complied with in this precise case, see for example, *O. García*, "Puigdemont wird so bald nicht ausgeliefert", Blog De legibus of 26. März 2018, accesible at, https://blog.delegibus.com; *N. Gazeas*, Neue Juristische Wochenschrift-aktuell 19/2018, pp. 14 ff.; *M. Heger,* "Einige Anmerkungen zum Auslieferungshaftbefehl in der causa Puigdemont", ZIS 5/2018, pp. 185-189; *E. Gimbernat*, "Alemania, obligada a entregar a Puigdemont por rebelión", published in El Mundo on 16.4.2018, accesible under http://www.elmundo.es/opinion/2018/04/16/5ad34048268e3ee23d8b45d9.html (last accessed April 2018). Quoting this autor see also *K. Ambos*, "Auslieferung des katalanischen Separatistenführers Kann Puigdemont doch wegen Rebellion verurteilt werden?", LTO (Legal Tribune On-Line), of 18.4.2018, accesible at: https://www.lto.de/recht/hintergruende/h/puigdemont-separatistenfuehrer-auslieferung-europaeischer-haftbefehl/. For a comprehensive study of this case and the double criminality requirement see *M. Muñoz de Morales Romero,* "Doble incriminación a examen: Sobre el *caso Puigdemont* y otros supuestos", 2018 (forthcoming), which I have read after finishing this paper, thanks to the courtesy of the author.

ducting a minutely detailed test of double criminality in the execution of an EAW within the EU AFSJ?[8]

The double criminality check stems from a traditional concept of sovereignty, often linked not only to the protection of a State's own national values, but also to the protection of its own national citizens. The grounds for the double criminality requirement in the international judicial cooperation are manifold. Among those grounds scholars mention: the political comity; the prevention of political conflicts; the reciprocity principle; the protection of the legality principle *nullum crimen, nulla poena sine legge*,[9] and the protection of the *ordre public*, being the latter one linked to the rule of law and the protection of fundamental rights.[10]

If the present case is analysed under the perspective of the justification of the double criminality requirement, it can be stated, that it is difficult to see which of these objectives of the double criminality test would apply to the present case: surrender of C. Puigdemont to Spain, even if there is no strict double criminality would, in my opinion, not affect the reciprocity principle (not applicable anyway within the EU AFSJ) nor the political comity –rather the opposite. Not doing it could be contrary to such principles and cause diplomatic tensions. The principle of legality and the protection of human rights are justifications that would not apply in this precise case either, as the facts were committed in Spain, the defendant knew the applicable criminal law at the time of committing the offence and the situation of the compliance with human rights standards (as well as penitentiary conditions) in Spain do not give rise to any doubts regarding the protection of human rights and the right to a fair trial of the defendant in case of being surrendered. It could be affirmed that due to the political tension, the opinions expressed and the acts taken by the Spanish government, the judicial independence might be affected. Even if this is an argument used by the defence lawyers in this case, the Spanish judicial independence is sufficiently safeguarded in the Spanish democracy to fear any undue interference from the executive in their decisions. The

8 It is interesting to point out that in 2016 there was no single case were a EAW was denied execution for lack of double criminality by German judicial authorities, see "Statistische Angaben für Erfahrungen mit dem Europäishen Haftbefehl im Jahre 2016", issued by the German Ministry of Justice in 2017. See also, the data published by the European Judicial Network, in "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015. 28-09-2017", accessible at https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=2025 (accessed April 2018): Out of 1635 persons that Germany arrested in execution of an EAW, only in 195 the German judicial authorities refused to surrender (12, 11%).

9 Although for *A. Nieto Martín*, "Reconocimiento mutuo, orden público e identidad nacional: la doble incriminación como ejemplo" La Ley, 31.5.2018, pp. 1-4, p.3, the argument of the principle of legality does not apply in execution of international cooperation requests, as this principle is already checked by the issuing authority. On the principle of legality and its relationship –or rather loss of connection- with the double criminality principle, see extensively, *Muñoz Morales* (fn.7).

10 See *J. Vogel* and *C. Burchard*, in: Grützner/Pötz/Kreß/Gazeas, Internationaler Rechtshilfeverkehr in Strafsachen, 3rd ed., Vor § 1 IRG, p. 169 and § 3 IRG, pp. 5 ff.

decision of the German court of 12 July 2018 rejects any kind of risk of abuse of process in Spain.

Finally, a general interpretation of the concept of *ordre public*, linked to the own national conception of the acts that should be criminalised, is one argument that, in my opinion, could justify the checking the double criminality. Assuming this analysis, should a judicial authority of the EU refuse to surrender a person because the offence described in the EAW is not equally criminalised in the State of execution? Is it really necessary to require an identical match, or would it suffice to check whether the offences in their abstract form are equivalent in order to comply with the double criminality requirement and thus with the obligation to cooperate within the EU AFSJ? And finally, in case there is not an exact match of the facts, and thus the double criminality in a strict sense would not exist, would the surrender of the defendant in such case run counter the German *ordre public* or its constitutional principles?

The ECJ in the *Grundza* case[11] addressed the issue of the scope of the double criminality requirement, though not with regard to an EAW, but with regard to Article 7 of Framework Decision 2008/909.[12] This case related to the principle of mutual recognition in the transfer of a convicted person to serve a custodial sentence in another State. The Court considered that such a requirement is complied with "where the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State".[13] I am not advocating that this judgment is directly applicable to the present case, but the ECJ's approach might shed some light on the idea that some flexibility could be warranted in assessing the double criminality requisite. And still the question in the decision of the EAW before the German Court is in how far it is coherent to keep a strict double criminality requisite in the EU single judicial area in which cooperation is supposedly governed by the principle of mutual recognition.[14]

Taking into account that applying a strict double criminality test could end up denying the possibility to try the person subject to the EAW for the crimes he is accused of in Spain, should we not question where is the right balance between respecting the sovereignty of the executing State and respecting the sovereign powers of the issuing State? In fact, following the rule of speciality (Article 27 FD EAW), the decision of a German Higher Regional Court that establishes the lack of double criminality and ultimately decides to surrender the defendant only for embezzlement precludes the

11 ECJ, 11.1.2017, case C-289/15, *Joszef Grundza*.

12 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008, L 327, p. 27), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

13 ECJ, *Joszef Grundza*, para. 54.

14 As states *Nieto Martín* (fn.9), p. 2, looking on the execution of an EAW through the lenses of the principles of extradition law, would run counter the principle of mutual recognition and the obligation to interpret the laws in conformity with the objectives of EU law.

Spanish Supreme Court from prosecuting the accused for the more severe crime of rebellion. The speciality principle was aimed mainly at preventing circumvention of the double criminality principle and especially at preventing the requested person from possibly being prosecuted for political crimes in the issuing State.[15] Nevertheless, in this precise case, where it is recognised that such political crimes as treason are regulated in most EU member States, it is difficult to see what is the point for undertaking an analysis of all facts of the offence of treason, making also an assessment of the factual narrative as well as of the credibility of the facts described by the requesting judge.

This case is not about protecting persons from being prosecuted for acts that the executing State does not even consider worth criminalising, as a similar offence exists in both States in this case. The difference here lies in whether the definition of the element of "violence" (*Gewalt*) for both offences matches. To that end the German Court has undertaken an analysis of the relevant facts to determine if under its point of view such acts entail enough violence to fall under the concept of violence required in the offence of treason. Undoubtedly, this check does not deal so much with the protection of fundamental rights of the defendant in the present case[16] or the principle of legality, or even the rule of law, but rather with the sovereignty principle and perhaps a lack of trust (or an overt distrust towards the justice system of other Member States). Under these circumstances, should such an approach be considered coherent with the obligation to cooperate in criminal matters and with the principle of mutual recognition? In my opinion, applying the double criminality test in a too strict way as required by the German case law, seems to run counter to the principles set out under Article 82 of the TFUE.

Whatever the final outcome in this specific case is[17] and whatever the reasons for the German Court to adopt a traditional approach towards the meaning of double criminality in the EAW proceedings has been, the entire case leads us to question whether Europe has really advanced, not so much in terms of cooperation – that is indisputable – but in terms of mutual trust and mutual recognition. So far, the case against Carles

15 In this sense, *J. Vogel* and *C. Burchard*, "Gesetz über die Internationale Rechtshilfe in Strafsachen, Kommentar, Article 1" p. 176. The speciality principle is be found already in Article 14(1) of the European Convention on Extradition, and as stated by the ECJ in *Leymann and Pustarov*, case C-388/08, of 1 December 2018 (para. 44), it is linked to the sovereignty of the executing Member State. See also, *L. Klimek*, European Arrest Warrant, Cham, 2015, p. 92, quoting R. Blekxtoon's Handbook on the European Arrest Warrant, p. 261; *M. Caianiello*, "Il principio di specialità", in: M. Bargis and E. Selvaggi (eds.), Mandato d'Arresto Europeo, Torino, 2005, pp.214-225.

16 If this were the case, I fully support the idea of limiting the mutual recognition principle when the protection of human rights is at risk, as does the "Manifesto on European Criminal Procedure" Project launched by a number of criminal law scholars, published as *A Manifesto on European Criminal Procedure Law. European Criminal Policy Initiative,* Stockholm, 2014.

17 The decision before the German *Oberlandesgericht* Schleswig-Holstein is final. The defendant could only challnege it before the German Constitutional Court for infringement of constitutional rights. On the other hand, it is possible that the Spanish Supreme Court waives the enforecement of the surrender.

Puigdemont suggests that the ASFJ is still far from being a reality, at least when it comes to sensitive cases that are not exempt from the double criminality test. Perhaps a more balanced approach by the national authorities towards cooperation in cases where no human rights issues are at stake should be fostered. In my opinion, an interpretation of the double criminality requirement focusing on the traditional approach in extradition cases, does not comply with the principle of mutual recognition and therefore it should be questioned if the interpretation of this requirement by the German court is not against the objectives of the EU law. The obligation to cooperate is stated very clearly under Article 1.2 of the FD EAW (obligation to execute the EAW under the principle of mutual recognition) and also under the general principles set out in Article 1 of the German Law on international judicial cooperation criminal matters.

Finally, the strict interpretation of the double criminality requirement in the field of the enforcement of an EAW, does not seem to be striking the right balance between effectiveness of the judicial cooperation in criminal matters and the protection of fundamental rights. In fact, such balance seems to be undermined by an excessive distrust or by a position too much prone towards keeping sovereign powers instead of by fostering the judicial cooperation among States that belong to a common AFSJ. The Puigdemont case before the German courts gives rise to think that while some Member States are willing to cooperate in establishing a true single area of justice –and truly believe in it– by even waiving their own national conception of certain offences, others continue to prioritise the strict application of their own legal concepts and invke all possibilities to refuse to execute an EAW. Whatever the reasons behind such an strict interpretation of the double criminality approach are –be it justified or unjustified distrust, or a strong position towards their own understanding of the criminal law, or concepts or sovereignty etc.– such approach may erode the principles of cooperation, by creating more distrust among the Member States, while not contributing in a clear way to enhancing the protection of fundamental rights.

III. Concluding remarks

The case of Puigdemont has brought to the forefront the limits –or inefficiency– of judicial cooperation in criminal matters within the Area of Freedom, Security and Justice, when the requirement of the double criminality is to be checked. This case shows that a traditional approach to the concept of sovereignty –and establishing the double criminality as an absolute requirement to comply with the requests for judicial cooperation in the execution of an EAW– undoubtedly weakens the effectiveness of the international judicial cooperation.

The double criminality principle is deeply rooted in the field of mutual legal assistance in criminal matters and EU Member States can still make the enforcement of an EAW subject to compliance of this requirement. Even if the EU Commission has repeatedly stated that the amendment of the FD EAW is not on the agenda, this case

shows that there are problems that should be addressed in the future with regard to the EAW.

A too strict application of the double criminality test in the realm of the EAW is contrary to the objectives set out in Article 67 and 82 of the TFUE, while it is not necessarily justified on grounds of protection of human rights. Only a traditional understanding of the concept of sovereignty can explain the approach taken by the German court in the case of the EAW issued by Spanish Supreme Court for the surrender of the defendant, Mr. Puigdemont. If the rationale behind such a thorough –almost excessive– check of double criminality were to lie in the lack of mutual trust, then much more would need to be done in order to overcome such distrust.[18] If it is the consequence of a traditional understanding of the extradition proceedings and the concept of sovereignty, it would mean that the EU is still quite far from advancing towards a single AFSJ based on the principle of mutual recognition.

18 See *M. Fichera*, The implementation of the European Arrest Warrant in the European Union: law, policy and practice, Cambridge et al., 2011, p. 205.