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Dual Criminality under Review: On the Puigdemont Case

Abstract

The Puigdemont case is calling into question the surrender proceedings between Member States. The ex–President is requested to trial for the commission, amongst others, of a crime of rebellion. As this offence is not included in Article 2.2 of Framework Decision 2002/584/JHA, the executing judge may control the principle of dual criminality. The German court has pointed out that double criminality prevents the surrender for the crime of rebellion since the violence required by the German offence of high treason, which is similar to the Spanish crime of rebellion, must be capable of making the State capitulate to the pretensions of the rebels and that has not been the case in Spain. However, in Grundza, the ECJ said that the condition of double criminality is met provided that the executing judge ascertains that the factual elements by which the person is requested are subject to a criminal penalty under domestic law. Was there no other way of interpreting the German criminal offence of high treason or of considering the facts described in the EAW form as criminal offences? This paper explores, firstly, whether the German judge has exceeded his powers in analyzing the concurrence of the element "violence" under domestic law. Secondly, it focuses on other possibilities to make Mr. Puigdemont's surrender successful.
Keywords: European Arrest Warrant, dual criminality, principle of conformity interpretation.

I. Introduction.

The principle of dual criminality means that the acts for which a person is requested (provided that they are not included in the list of offences foreseen by Article 2(2) of *Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*[1] and their penalty does not exceed 3 years' imprisonment) constitute an offence under the law of the executing Member State. In the *Puigdemont case*, as the offence of rebellion is not included in that list, the executing judge shall examine whether the principle is respected.

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1 OJ L 190, of 18.7.2002.

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Article 2.4 *in fine* of *Framework Decision 2002/584/JHA* provides guidelines on the interpretation of dual criminality by indicating that its control is alien to constituent elements of the infraction or however it is described. That makes it clear that the match is not to be sought between the respective normative definitions of the criminal offence in the legal systems of the issuing and executing States. This position has been maintained even in extradition proceedings.

A narrow control of the principle has also been recognized by the ECJ in the *Grundza case*. In that judgment, the Court of Justice ruled that the condition of double criminality is met provided that the executing judge ascertains that the factual elements by which the person is requested are subject to a criminal penalty under domestic law[2]. Therefore, the "offences do not need to be identical in the two Member States concerned"[3].

II. The Grundza case and the need for denationalization of the facts.

The *Grundza* approach implies that the executing judge "takes the facts" from the EAW form and verifies whether or not they could also be an offence under the "eyes" of domestic law. As Advocate General Michal Bobek pointed out[4], this is a diagonal conversion since the basic factual elements from the issuing State are subsumed under the laws of the executing State. It is not a horizontal conversion given that there is no match between the normative definitions of the offence in both States.

What happens, however, when the two offences to be compared are practically identical, so that what differs is the interpretation of one of the constituent elements of the offence? A purely horizontal conversation would lead to consider no violation of dual criminality. Applied to the *Puigdemont case*, that would mean that as the Spanish crime of rebellion and the German one of high treason are practically identical, dual criminality shall be satisfied. This interpretation would be a functionalist one and therefore it would be *favor* cooperation. However, it is contradictory. A horizontal or diagonal analysis of dual criminality cannot be made in the terms set out above, depending on whether it is more or less in the interests of judicial cooperation in criminal matters. What the *Grundza* doctrine stipulates, in my view, is that the elements constituting the offence are irrelevant, provided that the facts narrated in the EAW form are also punished under the law of the executing Member State.

In the *Puigdemont case*, the German judge, when delocalizing the facts and "transferring" them to the German territory, observes that the intensity of the violence required as a constituent element of the offence, is not sufficient. It is not since German case-law requires a violence of such intensity as to make the State capitulate to the pre-

2 *European Court of Justice* (ECJ) Judgement (Fifth Chamber), of 11 January 2017, case C-289/15, *Grundza*, parrs. 33, 47 and 53.
3 *Ibidem*, parr. 34.
4 Opinion of Advocate General Mr. Michal Bobek, delivered on 28 July 2016, case C-289/14, par. 56.

tensions of the rebels. This conversion can be seen as an analysis of the substance of the case. However, it should be noted that the German judge does not question whether or how violence has been proven. It only makes a very narrow interpretation of the term "violence". If analyzing the facts is not a horizontal but a diagonal operation, it makes sense to see whether they constitute an offence according to the interpretation usually done by national judges.

This normative judgement or assessment of the act as a whole by the executing State is the basis for double criminality[5]. There are constituent elements which do not lead to a different assessment on the facts by the issuing and the executing State even if they change. In other words, in some cases, the fact that the constituent element of the offence is X rather than Y or is to be interpreted in a different way does not lead to a change in the appreciation of the conduct as constituting an offence by the issuing and executing State. This is the case, for example, for descriptive elements referring to the territory, i.e. in cases of assimilation requiring protection of European and foreign interests of other Member States similar to national ones.

1) In the *Grundza case* the offence in both States (the Czech Republic and Slovakia) was to "thwart the implementation of an official decision". The problem was the interpretation of the constituent element "official decision". According to Slovak case law, "official decision" only refers to decisions of Slovak authorities. As the cooperation case referred to the offence of thwarting the implementation of a Czech official decision, the Slovak judge wondered whether the double criminality would be respected, if the requested person was surrendered. As I have already mentioned, the ECJ stated that the facts must constitute an offence under Slovak law "whatever its constituent elements or however it is described". Clearly, the situation presented before the ECJ led to understand that the facts were criminal in both States. In a nutshell, the normative judgment or assessment of the facts by both States did not change since in both legal orders the fact of thwarting an official decision was punished by a criminal sanction.
2) Another similar example would be the crime of illegal immigration under Article 318 *bis* Spanish Criminal Code. The offence consists of intentionally helping a non-national of an EU Member State to enter into Spanish territory or to transit through Spanish territory in a manner that violates the laws on the entry and transit of aliens. If a Spanish judge were asked by a European judge to hand over a person suspected of having illegally transferred different workers from different places in Romania, with transit through Hungary and destination in Austria, would the principle of double criminality be breached because one of its con-

5 The principle of legality has been also identified as the basis for dual criminality. However, since the *Advocaten voor de Wereld case* (*European Court of Justice* (ECJ) Judgment (Grand Chamber), of 3 May 2007, C-303/05, parr. 53), the ECJ has stipulated that the definition of the offences and of the penalties are matters determined by the law of the issuing Member States.

stituent elements does not coincide (Spanish territory)? [6] The answer is obviously not since the normative judgment or assessment of the facts by both States did not change. Both consider that illegal immigration irrespective of the place where it takes place must be considered as an offence.

3) In the same vein, the concept of "document" may be cited. Following *Act n. 5/2010, of 22 June*, *amending the Criminal Code,* Spain assimilated, through the amendment of Article 392.2 *in fine*, the trade and use of false identity documents. Spain has assimilated this type of forgery, but it may not be the case in other States. Does the foregoing mean that when a Spanish court requests the surrender of a person suspected of trading in any way with a false Spanish identity document to a Member State which does not assimilated national false IDs to EU or foreign ones, the latter must refuse to surrender? No, it does not. The *Grundza* doctrine would require cooperation because the normative judgment remains unchanged. Both States agree that trading with false identity documents should be a criminal offence.

However, a change in the interpretation of a constituent element may lead to a change in the normative judgement of the two States involved in the act of cooperation. This is the case for sexual abuse when the victim is a minor. In Spain, the age of sexual consent is 16 years (Article 183 *bis* Spanish Penal Code). If a person suspected of forcing a 15-years-old child to participate in conducts of a sexual nature or witness acts of a sexual nature was claimed by a Spanish judge to a European judge in whose State the age of sexual consent is 13 or 14 years, the facts for which the subject would be claimed would not constitute an offence in the latter State[7]. Therefore, the executing judge could deny surrender on the ground that dual criminality does not exist. Consequently, a change in a constitutive element such as the age of sexual consent modifies the normative judgment/assessment of such conduct by the two States involved in the act of cooperation.

It is exactly the same when it comes to normative elements. In some cases, a change in these elements does not alter the normative judgement on what should constitute an offence in the executing State. Thus, for example, the term "tax" or "duty". Article 4 *Framework Decision on the European arrest warrant* precludes refusal of surrender on the ground that the law of the executing State "does not impose the same type of tax or duty or do not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State". This provision expressly limits the scope of dual criminality. The rationale for the restriction is twofold. On the one hand, because the fight against tax fraud is a harmonized matter requiring joint action by the Member States. And, on the other hand, because a change in the normative

6 Thus, already in extradition proceedings. See Spanish National Court Decision, n. 17/2016, of 7 March 2016.

7 The principle of dual criminality would apply since the penalty foreseen in Spain for the commission of these facts does not exceed 3 years.

element "tax" or "duty" does not change the normative assessment or judgment on what should or should not constitute an offence.

There is, however, a change of assessment when it comes to the normative element "witness". It could be the case of a person who takes a false oath in an enforcement proceeding. A false statement about one's own property in these cases cannot be subsumed, for example, in the crime of false testimony by the Spanish Penal Code (Article 458), since the offender's procedural position is not that of witness, but that of executed. Exactly the same applies to the normative element "violence". In Germany, violence must be able to prevent or overcome State resistance to secession[8].

In my opinion, the German judge has not exceeded his powers in analyzing the concurrence of that element under domestic law. This operation of de-nationalization of the facts is precisely what *Grundza* enables. However, was there no other way of interpreting the German criminal offence of high treason or was there no other way of considering the facts described in the EAW form as criminal offences?

III. The principle of conformity interpretation and the Puigdemont case.

Since the *Pupino case*[9], framework decisions have been binding. State authorities, including judges, are therefore obliged to interpret national law in a manner consistent with Union law.

Given that in a European arrest procedure it is not a question of establishing or aggravating criminal responsibility, the interpretation of the offence in order to comply with the guarantee of the principle of double criminality could be made more flexible. In this sense, a solution would be to make a literal or grammatical interpretation of the term violence or threat of violence. Since the German court acknowledged the existence of violence, an interpretation of the criminal offence of high treason in line with the *Framework decision on the European arrest warrant* in a literal sense would have been enough to justify the surrender.

Another possibility of interpretation was to bear in mind the social reality of the time when the offence is applied. The offence of rebellion, high treason, etc., have moved from one code to another with similar wording. Normally thought of in palatial times with the mind on an armed uprising, the term violence was configured in a very restrictive way. If a wide interpretation could give rise to an analogical interpretation by the trial judge, in the case of the cooperating judge, taking this parameter into account leads him to make an interpretation in accordance with the obligation to coop-

8 W. Stree/D. Sternberg-Lieben, "Artikel 81", in *Strafgesetzbuch Kommentar*, Ed. C.H. Beck, 2006, p. 1118.

9 *European Court of Justice* (ECJ) Judgment, of 16 June of 2005, case C-105/03. For a comment on this judgment, see M. Muñoz de Morales Romero, "L'application du príncipe d'interprétation conformement aux décisions-cadre: vers l'effet direct? Référence speciales a l'affaire Pupino", in L. Arroyo Zapatero/A. Nieto Martín/M. Muñoz de Morales Romero (eds.): *European Criminal Law: An overview*, Ed. Universidad de Castilla-La Mancha, 2010.

erate, transferring this prohibition of analogy to his counterpart who is better placed to trial the case.

The third option would be to look for another offence that could bring together the facts narrated in the request for surrender. This possibility also arose when the case was in the hands of the Belgian courts, although in this system there was not a crime so similar to rebellion as there is in the German Criminal Code[10]. There has been talk of applying the conspiracy of high treason[11], the crime of resistance, the crime of public incitement to participate in a prohibited public meeting[12], the offence of public disorders or even the general offence of coercion. GIMBERNAT alludes to the two latter offences[13]. The same sentence that was used by the German court as an argument to deny the rebellion[14] reveals what other crimes may be at stake. The ruling referred to the case of an environmental activist, Alexander Schubart, the leader of a citizen platform against the construction of a new runway at Frankfurt airport in the 1980s. Schabart called on activists to come to the airport and protest non-violently. During the demonstration there were violent incidents, barricades were set on fire, police officers were injured, etc. Schubart was accused of coercion of the constitutional bodies (Article 105 German Criminal Code) and of disturbing public order (Article 125 German Criminal Code). The German judge ruled out the environmentalist as the perpetrator of an offence of coercion of constitutional bodies (Article 105), but not of the offence of public disorder (Article 125) or of generic coercion (Article 240 III), which also requires violence, but not in such a restrictive manner as offences against constitutional order do. Therefore, in the words of GIMBERNAT, "the statement by the OLG SH that Puigdemont's conduct under German law would not be punishable is false". If the *Schubart case* is applicable to the *Puigdemont case* because "both cases are not only comparable, but in some respects even identical"[15], then Mr. Puigdemont's conduct could constitute an offence of public disorder and general coercion. Therefore, the dual criminality requirement would be fulfilled[16]. I agree with the argument, although it should be borne in mind that the *Grundza doctrine* does not only require for dual criminality to be respected that the facts constitute an offence, but also a certain similarity regarding the protected legal interest in both States. With regard to the crime of

10 On the European Arrest Warrant issued to Belgium, see M. Muñoz de Morales Romero, "¿Cómo funciona la orden de detención y entrega europea? El caso del *ex-president* y sus *consellers* como ejemplo", in *Diario La Ley*, nº 9096.

11 A. Javato Martín, "Las dificultades del delito de rebelión", *El País*, 12.4.2018 (last access on 3.05.2018).

12 A. Javato Martín, "Existe el delito de sedición en Alemania, Suiza y Bélgica", in *Diario La Ley*, nº 9188, de 2 de mayo de 2018.

13 E. Gimbernat, "Alemania, obligada a entregar a Puigdemont por rebelión", en Tribuna, El Mundo, 16.4.2018, available in http://www.elmundo.es/opinion/2018/04/16/5ad34048268e3ee23d8b45d9.html (last access on 30.4.2018).

14 BGH of 23 November of 1983.

15 OLG SH, of 5 April 2018 (Legal Ground II 2 a).

16 E. Gimbernat, ""Alemania, obligada a entregar…", op., cit.

public disorder, a certain similarity could be maintained, in the case of coercion it is more debatable.

III. Conclusions.

I am with those who believe that double criminality should disappear. However, it will not be possible until respect for "unity in diversity" is accepted. This slogan implies the general acceptance of the criminal differences between Member States when it comes to cooperation. That means that Member States shall not impose their own dogmatic evolution or jurisprudential development on an issue. Only a difference leading to a problem of "public order" or "national identity" could take precedence over cooperation. In the words of NIETO MARTÍN, "Article 4.2 TFEU [referred to "national identity"] would become the window through which fundamental rights are given entry in the application of the Union law, and which was expelled through the door due to the restrictive standard protection of fundamental rights supported by the ECJ in the *Melloni case*"[17]. Its *modus operandi* would be the same as that of "public order", but it would allow for greater national discretion. "National identity" would be "a hard and indisputable core"[18] which would lead to refusal cooperation when it comes to facts which "do not involve any legal devaluation or social harm and which would undermine the basic principles and choices of criminal policy in a State"[19]. The author gives the example of cases of incest (unless they could be traced back to an offence of sexual abuse) or consenting sexual relations between homosexual adults. Other authors as ASP/VON HIRSCH/FRÄNDE speak of a "public order" clause which would be activated in cases of cooperation for strict liability offences that do not require a means rea element, given that the principle of guilt is a basic and constitutional principle in a large majority of Member States[20].

Although I am in favour of the elimination of double criminality, the fact is that its control is permitted by law as mandatory or facultative. That being the case, a flexible interpretation of the principle in favour of cooperation should prevail. Just because it is flexible, it does not mean that it is non-existent. Consequently, the starting point for the control must be the State's basis for dual criminality: the normative judgment or assessment of the act for which the requested person is charged or for which he or she is convicted. If, by changing the constituent elements of the offence, the executing State's normative judgment or assessment of these facts also changes and the principle of interpretation in accordance with EU law prevents those facts from being regarded as criminal infraction, then dual criminality will be activated by preventing surrender.

17 A. Nieto Martín, "El reconocimiento mutuo en materia penal y el Derecho primario", in L. Arroyo Jiménez/A. Nieto Martín (dirs.): *El reconocimiento mutuo en el Derecho español y europeo*, Marcial Pons, 2018, p. 241.

18 *Ibídem*, p. 241.

19 A. Nieto Martín, "Editorial", en *La Ley: Unión europea*, 2018, nº 58.

20 P. Asp/A. Von Hirsch/ D. Frände, "Double criminality and transnational investigative measures in EU Criminal Proceedings: Some Issues of Principle", in *Zis* 11/2006, p. 514 and 515.

However, this does not prevent the search for another criminal offence covering the facts described in the surrender form, provided that the protected legal interest is similar (*Grundza case*).

Finally, it is worth considering whether the *Grundza doctrine* can also be used when the surrender of a person is at stake. This case was decided under the *Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU*[21] on the recognition of convictions. As the sentence is worded, many of its passages could simply be reproduced in EAW's assumptions. For example, where the ECJ states in *Grundza* that the *Framework Decision 2008/909/*JHA replaces a number of instruments of international law with a view to strengthening cooperation in the field of enforcement of criminal judgments; the *Framework Decision on the EAW* replaces all the previous instruments concerning extradition with the aim of speeding up and removing the complexity (Recital 11 and Article 31) and the risks of potential delay inherent in the present extradition procedures (Recital 1 and 5). In addition, the *Handbook on How to Issue and Execute a European Arrest Warrant* in its last edition (2017) expressly refers to the *Grundza* case as a criterion for interpreting the principle of double criminality. However, the aim behind the *Framework Decision 2008/909/JHA* is to facilitate the social reintegration of the convicted person. In other words, the aim benefits the subject. In the case of the *Framework Decision on the EAW*, however, the aim is to prevent the offender from evading justice in the issuing State. It is a goal "against" the individual. The ECJ clearly states that even for non-listed offences, the principle of double criminality is the exception to the general rule and should therefore be interpreted in a flexible way (par. 46). This lax interpretation, it points out, favours the objective of facilitating reintegration (par. 51). It is true that the ECJ pronounces itself in these terms in a neutral way. At no point does it indicate that a lax interpretation of dual criminality contributes to achieving an objective that benefits the subject. However, this difference could be important when weighing up the interests at stake: those of the issuing Member State (preventing the person concerned from evading the administration of justice), those of the executing Member State (cooperating with a Member State where such cooperation is in accordance with its legal system) and those of the requested person (re-entering society after completion of the sentence).

This is linked to the need for a preliminary ruling to clarify whether the principle of dual criminality is to be interpreted differently depending on the mutual recognition instrument at issue[22]. The doubts do not end here: whether the path to follow is only *Grundza* or whether, on the contrary, with a normative identity (both crimes are de-

21 OJ L 327, 5.12.2008.

22 See G. Vermeulen/W. De Bondt/C. Tyckman (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back, footed in reality*, IRCP research series Volume 42, 2012, p. 109; P.O. Träskman, "Should We Take the Condition of Double Criminality Seriously?", in N. Jareborg (ed.), *Double Criminality. Studies in International Criminal Law*, 1989, p. 145.

fined in a similar way), the functionalist perspective (pro-cooperation) would already be paramount in any case.