



**According to Advocate General Bot, the judicial authorities which are to execute a European arrest warrant cannot make the surrender of a person, convicted in their absence but aware of the scheduled trial, subject to a right to review the judgment in the Member State which issues the warrant**

*The rights of the accused person are observed if he gave a mandate to a legal counsellor to defend him and was actually defended by that counsellor at the trial*

The Framework Decision on the European arrest warrant<sup>1</sup> aims to simplify and accelerate surrender procedures for persons between Member States. The new rules remove the complexity and potential for delay inherent in extradition procedures by putting in place a system of free movement of judicial decisions based on mutual recognition.

In that context, a provision of the Framework Decision<sup>2</sup> precludes judicial authorities from refusing to execute the European arrest warrant issued for the purposes of executing a sentence, in a situation where the person concerned failed to appear at trial, where, having been aware of the scheduled trial, that person gave a mandate to a legal counsellor to defend him and he was actually defended by that counsellor.

However, according to the case-law of the Tribunal Constitucional (Constitutional Court) (Spain), if sentences are imposed for serious offences in the absence of the accused, surrender must be conditional upon the availability of review of the judgment in the Member State which issues the arrest warrant.

In October 1996, the Audiencia Nacional (National High Court) (Spain) declared that the surrender of Mr Stefano Melloni to Italy was justified so that he could be tried there in respect of the acts stated in the arrest warrants issued by the Tribunale di Ferrara (Italy). Following the decision to release him on bail against payment of 5 000 000 pesetas (approximately EUR 30 000), which he paid the following day, Mr Melloni fled, so that he could not be surrendered to the Italian authorities.

In 1997, the Tribunale di Ferrara (District Court, Ferrara) (Italy) declared that the applicant had failed to make appearance in court and directed that notice should in future be given to the lawyers already appointed by him. By judgment of 2000 of the Tribunale di Ferrara, subsequently upheld by judgment of 2003 of the Corte d'appello di Bologna (Bologna Appeal Court) (Italy), Mr Melloni was sentenced, in his absence, to 10 years' imprisonment for bankruptcy fraud. By judgment of 2004, the Corte suprema di cassazione (Supreme Court of Cassation) (Italy) dismissed the appeal lodged by his lawyers.

Following his arrest by Spanish police, Mr Melloni opposed his surrender to the Italian authorities, claiming, first, that at the appeal stage he had appointed another lawyer, revoking the appointment of the two previous lawyers, despite which notice was still being given to them. Second, he

<sup>1</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2002 L 190, p. 1 and OJ 2009 L 81, p. 24).

<sup>2</sup> Article 4a(1)(a) and (b).

contended that under Italian procedural law it is impossible to appeal against sentences imposed *in absentia*, for which reason the execution of any European arrest warrant should, where appropriate, be made conditional upon Italy's guaranteeing the possibility of appealing against the judgment.

In September 2008, the Audiencia Nacional authorised surrender of the applicant to the Italian authorities in order to serve the sentence imposed upon him by the Tribunale di Ferrara, considering that it was not proved that the lawyers appointed by Mr Melloni had ceased to represent him. The Spanish court held that his rights of defence had been respected, since he had been aware from the outset of the forthcoming trial, deliberately absented himself and appointed two lawyers to represent and defend him, who acted, in that capacity, at first instance, and in the appeal and cassation proceedings, thus exhausting all remedies.

Mr Melloni appealed against that decision to the Tribunal Constitucional. That court asks the Court of Justice whether the Framework Decision precludes the Spanish courts from making surrender of Mr Melloni conditional on the right to have his conviction reviewed.

In his Opinion delivered today, Advocate General Yves Bot proposes that the Court of Justice reply, first, that the provision in question of the Framework Decision **precludes the executing judicial authority**, in the situations specified in that provision, **from making the execution of a European arrest warrant conditional upon the person who is the subject of the warrant being entitled to a retrial in the issuing Member State**.

The Advocate General considers that that conclusion derives not only from the wording of that provision but also from the objectives pursued by the European Union legislature. Faced with uncertainties capable of reducing the effectiveness of the mechanism of mutual recognition of judgments rendered *in absentia*, the European Union legislature decided to provide an exhaustive list of the situations in which the execution of a European arrest warrant issued in order to enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence. That solution is incompatible with any retention of the possibility for the executing judicial authority to make that surrender conditional on the conviction in question being open to review in order to guarantee the rights of the defence of the person concerned, in circumstances such as those in the present case.

Second, the Advocate General considers that the provision is **compatible with the right to a fair trial and observance of the rights of the defence** recognised by the Charter of Fundamental Rights of the European Union. He considers that that provision lays down the conditions in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to appear at his trial, so that he cannot claim the benefit of a retrial.

Finally, the Advocate General states his opinion on the scope of Article 53 of the Charter of Fundamental Rights, which provides that the Charter is not to adversely affect human rights recognised, in their respective fields of application, by the Member States' constitutions. According to the Advocate General, that provision cannot be relied upon so as to give primacy to national constitutional law over the Framework Decision and thus to make the execution of a European arrest warrant conditional upon the right to a retrial in the issuing Member State. That follows from observance of the principles of primacy of European Union law, the uniform and effective application of European Union law within the Member States, and legal certainty.

In addition, the Advocate General notes that the level of protection of fundamental rights must be fixed not in the abstract, but rather in a manner adapted to the requirements connected with the objectives to be attained by the European Union. He states that, first, in order to achieve the objective of the construction of an area of freedom, security and justice, the European Union legislature sought to increase the mutual confidence between the Member States by approximating the laws of the Member States concerning the rights of individuals in criminal proceedings in order to facilitate and accelerate judicial cooperation. Second, the European Union legislature wished to protect fundamental rights without undermining the effectiveness of the European arrest warrant

mechanism, avoiding also a situation where procedural guarantees are used only in order to place oneself outside the reach of the law.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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*The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.*

*Press contact: Christopher Fretwell ☎ (+352) 4303 3355*

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