



The Court of Justice clarifies the scope of the principle *ne bis in idem* applicable when executing a European arrest warrant in respect of acts which were previously the subject of a sentence in a third State

In September 2019, a European arrest warrant ('EAW') was issued by the German judicial authorities against X, in order to conduct criminal proceedings for acts committed in 2012 against his partner and her daughter. In March 2020, X was arrested in the Netherlands. He objected to his surrender to those authorities, asserting that he had previously been prosecuted and finally judged in respect of the same acts in Iran. More specifically, he had been acquitted in respect of some of those acts and sentenced in respect of the other acts to a term of imprisonment which he had served almost in full before the sentence was remitted. That remittance was the result of a general leniency measure granted by a non-judicial authority, the Supreme Leader of Iran, to mark the 40th anniversary of the Islamic Revolution. Thus, according to X, due to his prior conviction in Iran, the principle *ne bis in idem*, as set out in Article 4(5) of the Framework Decision on the EAW,¹ transposed into Dutch law, precludes the execution of the EAW concerning him.

In accordance with that article, the executing judicial authority may refuse to execute an EAW if the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country. That ground 'for optional non-execution' is similar to the one 'for mandatory non-execution' provided for in Article 3(2) of the Framework Decision, with the exception that the latter refers to a judgment given not 'by a third State' but 'by a Member State'.

In that context, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) decided to seek the guidance of the Court of Justice on the interpretation of Article 4(5) of that framework decision. That district court, called upon to rule on the surrender of X, is uncertain as regards the margin of discretion it enjoys in such a case, the concept of 'same acts' referred to in that article, in so far as the Iranian courts have not explicitly ruled on certain acts which X is alleged to have committed in Germany, and the scope of the condition that, where there has been a sentence, that sentence 'has been served ... or may no longer be executed under the law of the sentencing country'.

By its judgment, delivered in the context of the urgent preliminary ruling procedure, the Court of Justice rules, first of all, that the executing judicial authority must have a margin of discretion in order to determine whether it is appropriate to refuse to execute an EAW on the ground concerned. Next, the concept of 'same acts'² must be interpreted uniformly. Lastly, the condition relating to the execution of the sentence is met in a situation such as that at issue in the case in the main proceedings.

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

² That concept is referred to in Article 3(2) and Article 4(5) of the framework decision.

Assessment of the Court of Justice

In the first place, the Court recalls that the framework decision sets out, first, the grounds for mandatory non-execution of an EAW,³ and second, the grounds for optional non-execution⁴ which the Member States are free to transpose or not into their domestic law. Nevertheless, where the latter are transposed, the Member States may not provide that the judicial authorities are required to automatically refuse to execute any EAW concerned. Those authorities must have a margin of discretion, allowing them to carry out an examination on a case-by-case basis, taking into consideration all of the relevant circumstances. Depriving them of that possibility would have the effect of substituting a mere option to refuse to execute an EAW with a genuine obligation, although such a refusal constitutes the exception, the execution of the EAW being the general rule.

Furthermore, the Court emphasises the difference with the ground for mandatory non-execution provided for in Article 3(2) of the framework decision, the application of which, by contrast, does not leave any discretion to the executing judicial authority. The principles of mutual trust and of mutual recognition, which prevail between the Member States and require them to consider that each of them complies with EU law, and, more specifically, fundamental rights, are not automatically transferrable to judgments given by the courts of third States. Thus, a high level of trust in the criminal justice system, as it exists between the Member States, cannot be presumed as regards third States. For that reason, the executing judicial authority must be allowed a margin of discretion.

In the second place, the Court finds that the concept of 'same acts', referred to in Article 3(2) and Article 4(5) of the framework decision, must be interpreted uniformly. For reasons of consistency and legal certainty, those two concepts, worded in identical terms, must be given the same scope. The Court adds that the fact that Article 3(2) concerns judgments given in the European Union, whereas Article 4(5) refers to those given in a third State, cannot, as such, justify that concept being conferred a different scope.

In the third place, the Court rules that the condition relating to the execution of the sentence, provided for in Article 4(5) of the framework decision, is met in a situation such as that at issue in the main proceedings. In that regard, the Court emphasises that that article refers, in a general manner, to the 'law of the sentencing country', without providing further details as regards the reason for the impossibility of the execution of the sentence. It is therefore necessary, in general, to recognise all leniency measures provided for by the law of the sentencing country which have the effect that the imposed sanction may no longer be executed. In that regard, the seriousness of the acts, the nature of the authority which granted the measure, or the considerations in which that measure is rooted, where, for instance, it is not based on objective criminal policy considerations, have no impact.

Nevertheless, the Court adds that the executing judicial authority must strike a balance when exercising the discretion it enjoys for the purpose of applying the ground for optional non-execution provided for in Article 4(5) of the framework decision. It must reconcile preventing the impunity of convicted and sentenced persons and combating crime with ensuring legal certainty as regards those persons through respect for decisions of public bodies which have become final. The principle *ne bis in idem*, set out in the framework decision in both Article 3(2) and Article 4(5), encompasses those two aspects.

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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³ They are provided in Article 3 of the framework decision.

⁴ They are provided in Articles 4 and 4a of the framework decision.

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

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