



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-717/18
Procureur-generaal

AG Bobek: when assessing the maximum threshold period imposed by the Framework Decision on the European arrest warrant in order to surrender a requested person without verification of the criterion of double criminality, the relevant law of the issuing Member State is the one actually applicable to the case

In 2012 and 2013, a rapper composed, performed and published on the Internet several rap songs. By judgment of 21 February 2017, the Audiencia Nacional (National High Court, Spain) sentenced the rapper in relation to those activities to, among others, a prison sentence of two years for the offence of glorification of terrorism and the humiliation of the victims of terrorism. That was the maximum sentence laid down for that offence in the Spanish Criminal Code at the time of the facts, before its amendment in 2015, following which a maximum of three years was set. The appeal against that judgment was dismissed by the Spanish Supreme Court in February 2018. The rapper left Spain for Belgium. In June 2018, a European arrest warrant ('EAW') was issued by the Audiencia Nacional against the rapper, with a view to executing the sentence for the offences of which he had been found guilty. It indicated that the offence of glorification of terrorism and humiliation of the victims of terrorism fell under the category 'terrorism'. Indeed, the Framework Decision on the EAW¹ contains a list of 32 offences, including that of 'terrorism', which is not to give rise to verification of double criminality, if they are punishable in the issuing Member State by a custodial sentence of a maximum period of at least three years.

By order of 17 September 2018, the Rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (Court of First Instance, Oost-Vlaanderen, Ghent Division, Belgium) refused to execute the EAW. On the same day, the public prosecution service lodged an appeal against the aforementioned order.

The Hof van Beroep te Gent, kamer van inbeschuldigingstelling (Indictment Chamber of the Court of Appeal of Ghent, Belgium) has referred questions to the Court of Justice, as it has doubts as to which version of the law of the issuing Member State (Spain) is relevant in order to rule on whether the requirement for a maximum length of penalty of at least three years set out in the Framework Decision is met. What is the appropriate reference point for assessing whether that requirement is fulfilled? Is it the maximum custodial sentence *applicable to the case at hand*, which is normally governed by the law that applied when the offence was committed (two years in this case, as the offences were committed in 2012 and 2013)? Or is it the maximum sentence provided for by the national law in force *at the time of issuing the EAW* (three years in this case, after the Spanish Criminal Code was amended in 2015)?

In today's Opinion, **Advocate General Michal Bobek proposes that the Court of Justice declare that, for the purposes of assessing the maximum threshold period of at least three years imposed in order to dispense with verification of double criminality, the Framework Decision on the EAW refers to the criminal legislation that is applicable in the issuing Member State to the specific criminal offence(s) to which the EAW relates.** This is, in other

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (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).

words, the law of the issuing Member State that is actually applicable to the case of the requested person.

The Advocate General examines in the first place the wording of the Framework Decision, and states that it is inconclusive, as the precise point in time when the 32 offences listed are punishable in the issuing Member State by a custodial sentence for a maximum period of at least three years is not explicitly stated.

From the point of view of the context, Advocate General Bobek states that there are compelling reasons of both a logical and a systemic nature stemming from the Framework Decision to reject an interpretation that would dissociate the law actually applicable to the criminal case for which the surrender is requested from the law of reference for the purposes of dispensing with verification of double criminality. Moreover, the undeniable virtue of interpreting the Framework Decision as referring to the law actually applicable to the facts of the case is that it offers a simple, clear and foreseeable legal framework. With the potential and only exception of subsequent amendments more favourable to the accused, that frame of reference would remain immutable and stable.

Regarding the purpose of the Framework Decision, the Advocate General recalls that its clear aim is to facilitate and accelerate judicial cooperation. The principle of mutual recognition being the cornerstone of this instrument, executing judicial authorities should execute EAWs as a general rule and only refuse to do so on the listed grounds for non-execution, which are exhaustive and must be interpreted strictly. Notwithstanding this, Advocate General Bobek underlines that effectiveness is not the only value pursued by the Framework Decision, as, for example, fundamental rights must be respected in the field of the EAW. He also distinguishes between the effectiveness of the Framework Decision (*structural effectiveness*) and the effectiveness of a specific EAW in an individual case (*individual effectiveness*). In his view, the latter is difficult to translate into generally efficient and operational rules and does not provide for a foreseeable frame of reference, as, in a given case, there would be many different legal frameworks which could be considered to be the most effective in order to successfully ensure the surrender of a requested person.

Finally, the Advocate General points out that **the case before the Court of Justice is not concerned with the merits of the sentencing decision whose execution is sought by the EAW at issue, or with whether the offence of ‘glorification of terrorism and humiliation of the victims of terrorism’ can automatically be subsumed under ‘terrorism’ for the purposes of the list contained in the Framework Decision. He underlines that the answer given does not have any impact on other aspects affecting the potential success of the EAW at issue**, such as consideration of surrender for the other offences for which the person has been requested, or the assessment by the executing judicial authority of the double criminality criterion of the Framework Decision with regard to all the offences at issue – according to the Framework Decision, for offences other than those on the aforementioned 32-itemed list, verification of double criminality may be required. Advocate General Bobek recalls that the discussion on the determination of the relevant applicable law with regard to the issuing Member State related to the system that makes it possible to avoid the verification of double criminality is not automatically transposable to the interpretation of the system within which that verification applies.

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 EU 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.

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