

Case C-164/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

4 March 2022

Referring court:

Audiencia Nacional (Spain)

Date of the decision to refer:

2 March 2022

Accused:

Juan

Subject matter of the main proceedings

European arrest warrant – Surrender of a Spanish national to the Portuguese judicial authorities for the purpose of executing a prison sentence – Refusal of the surrender – Serving of the sentence in Spain

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – *Ne bis in idem* principle – Concept of ‘same facts’ – Assessment by the court – Recognition of convictions issued in other EU Member States – Totality principle – Proportionality – Compatibility of Spanish legislation with the principle of mutual recognition and various EU legislative instruments

Questions referred for a preliminary ruling

1. Whether, in the present case, a situation of ‘*bis in idem*’ for the purposes of Article 50 of the Charter of Fundamental Rights of the European Union (‘the Charter’) and Article 54 of the Convention implementing the Schengen Agreement arises, on the grounds that, according to the scope ascribed to that concept by European case-law, the same acts are involved; or whether it is instead for this court to make the assessment, based on the principles set out in this

decision, including the requirement to apply the totality principle and for the sentence to be capped in accordance with proportionality criteria, on the grounds that the case involves a single continuing offence.

2. If it is concluded that a situation of ‘*bis in idem*’ does not arise, on the grounds that, in accordance with the criteria put forward in this decision, the facts are not completely identical:

A) Whether, in the light of the circumstances of the present case, the restrictions on the effects of judgments delivered in other EU Member States expressly established in Article 14(2) of the Ley Orgánica 7/2014 de 12 de noviembre, sobre intercambio de información de antecedentes penales y consideración de resoluciones judiciales penales en la Unión Europea (Organic Law 7/2014 of 12 November 2014 on exchanging information on criminal records and taking account of judicial decisions in criminal matters), which transposes European legislation, are compatible with Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, and with Article 45 and Article 49(3) of the Charter and the principle of mutual recognition of judicial decisions within the European Union.

B) Whether the absence of a procedure or mechanism in Spanish law which provides for the recognition of judgments delivered in other European countries, for the application of the totality principle and for the adjustment or capping of sentences to ensure they are proportional, in situations where a sentence imposed by a foreign court is to be served in Spain and the sentence concerns acts which form a continuing offence or linked offences when taken in conjunction with other acts that have been tried and been the subject of a conviction in Spain, is contrary to Article 45 and Article 49(3) of the Charter, in conjunction with Article 4(6) of Framework Decision 2002/584/JHA of 13 June 2002 and Article 8(1) and (2) of 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 and, in general, with the principle of mutual recognition of judicial decisions within the European Union.

Provisions of European Union law and case-law relied on

- Charter of Fundamental Rights of the European Union, Article 45, Article 49(3) and Article 50.
- Convention implementing the Schengen Agreement, Article 54.
- Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Articles 3(2) and 4(6).

- Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.
- 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, Article 8(1) and (2) and Article 9(1)(c).
- Judgments of the Court of Justice of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165); of 28 September 2006, *Gasparini and Others* (C-467/04, EU:C:2006:610); and of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683).

Provisions of national law relied on

- Código Penal (Criminal Code), Article 74(2) and Article 76.
- Ley de Enjuiciamiento Criminal (Code of Criminal Procedure), Article 17 and the third paragraph of Article 988.
- Organic Law 7/2014 of 12 November 2014 on exchanging information on criminal records and taking account of judicial decisions in criminal matters within the European Union, Article 14(2)(c).
- Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea (Law 23/2014 of 20 November 2014 on the mutual recognition of judgments in criminal matters within the European Union), Article 48, Article 85(1)(c) and Article 91.

Succinct presentation of the facts and procedure in the main proceedings

- 1 The Tribunal Judicial da Comarca de Lisboa Juízo Central Criminal de Lisboa – Juiz 16 (Lisbon District Court, Lisbon Central Criminal Court, Court 16, Portugal) has issued a European arrest warrant (‘EAW’) for the Spanish national Juan, who, by judgment of 20 January 2020, was sentenced by that court to a term of imprisonment of 6 years and 6 months for an offence of aggravated fraud pursuant to Article 217(1) and Article 218(2)(a) and (b) of the Portuguese Criminal Code in respect of offences committed in 2005.
- 2 Juan is currently in prison in Spain, serving the sentence imposed on him in the judgment of 13 July 2018 delivered by the First Section of the Criminal Division of the Audiencia Nacional (National High Court, Spain) (situated in Madrid), which was partially set aside by the judgment of the Second Chamber of the

Tribunal Supremo (Supreme Court, Spain) of 4 March 2020 in the criminal proceedings known as the Fórum Filatélico case.

- 3 The Juzgado Central de Instrucción (Central Court of Preliminary Investigation) No 1 of the National High Court commenced proceedings against Juan for the execution of the EAW, and issued an order dated 20 December 2020 in which it refused to execute the EAW on the grounds that the subject was a Spanish national. The court ruled, however, that the sentence of 6 years and 6 months imposed in Portugal should be served in Spain.
- 4 Juan has lodged an appeal with the Criminal Division of the National High Court against the aforesaid decision of the Central Court of Preliminary Investigation No 1 of the National High Court.

The essential arguments of the parties in the main proceedings

- 5 Juan argues that the acts addressed by the judgment of the First Section of the Criminal Division of the National High Court of 13 July 2018 in the Fórum Filatélico case are the same as those for which he was tried in Portugal, and he therefore asserts the defence of *res judicata* established in Article 48(1)(c) of Law 23/2014 in conjunction with Article 3(2) of Framework Decision 2002/584/JHA.
- 6 He cites the extensive case-law of the Court of Justice of the European Union on the international principle of *ne bis in idem*, in particular the judgment of 9 March 2006, *Van Esbroeck* (C-436/04, EU:C:2006:165), according to which the issues must be examined on the basis of the facts, rather than their legal classification. He contends that the case-law of the Court of Justice has developed an autonomous concept of ‘the same acts’, which is interpreted as the ‘existence of a set of facts which are inextricably linked together’.
- 7 The Ministerio Fiscal (Public Prosecution Service) considers that the defence of *res judicata* does not arise, because the cases do not involve the same acts. The acts that occurred in Spain relate to victims included in the list appended to the judgment, whereas the Portuguese judgment concerns acts which took place in Portugal and which affect other victims.
- 8 The Public Prosecution Service cites case-law according to which *res judicata* does not arise in this type of situation, although subsequently the totality principle may be applied to the sentences pursuant either to Article 76 of the Criminal Code or the proportionality principle, with a maximum limit being placed on the sentence that reflects an assessment of all the facts as a whole.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 9 The referring court notes that the acts on which the Spanish conviction is based and those on which the Portuguese conviction is based concern a similar pattern of

behaviour (a pyramid scheme fraud relating to stamps), but that they took place in different locations. The Spanish judgment addresses activities that took place in Spain, while the Portuguese judgment refers to acts that took place in Portugal. The numerous victims in the two cases are therefore different. In one case they were clients of Fórum Filatélico S. A., which operated in Spain, and in the other they were clients of Iniciativas de Gestão, the subsidiary of the former company which operated in Portugal. The relationship between the two companies and the similarity of their activities are clear from the facts set out in the EAW form sent by the Portuguese issuing judicial authority.

- 10 The sentence imposed under the Spanish judgment is based on the acts carried out by Juan through Fórum Filatélico, S. A. in Spain, in his capacity as head of Grupo Fórum, at its Madrid office, although reference is also made to its subsidiary companies, including Fórum Iniciativas de Gestão. Nevertheless, the facts and legal reasoning in the Spanish judgment contain no more than an occasional tangential reference to the Portuguese company. Similarly, the Portuguese judgment refers only tangentially to the scheme's activities outside Portugal, focusing on the activities of Forum Filatélico Iniciativas de Gestão solely in Portugal.
- 11 The first question that arises is whether the principle of *ne bis in idem* applies in this case. The question must be examined on the basis of the facts, rather than their legal classification, because otherwise there would be as many barriers to the free movement of citizens within the Schengen area as there are criminal law systems in the contracting States. Moreover, it should be noted that, in essence, the Portuguese and Spanish judgments adopt the same legal classification of the facts.
- 12 The case-law of the European Court of Justice adopts an autonomous concept of 'the same acts'. This concept refers to the identity of material acts, understood as the existence of a set of facts or factual circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (judgment of the Court of Justice of 9 March 2006, *Van Esbroeck*, C-436/04, EU:C:2006:165). The European Court of Human Rights includes this same criterion in its judgment of 10 February 2009, *Zolotoukhine v. Russia*, among others.
- 13 Traditionally there have been two possible interpretive options in comparative law. On the one hand, 'act' may be interpreted as referring to the historical event which took place, decoupled from its legal classification (naturalist theory – the same fact); this is the approach adopted, for example, in German and Danish law. On the other hand, the expression can be interpreted as addressing the act from a legal perspective, in terms of belonging to a category of criminal offences, rather than as a natural historical event (normative theory – the same legal content or same offence); this appears to be the theory that applies in Spanish case-law (see, for example, the judgments of the Supreme Court of 26 January 2016, 18/2016, and of 2 December 2020, 654/2020, among others).

- 14 The distinguishing feature of the present case is that the Spanish judgment in which Juan was convicted is much broader and covers many more acts than the Portuguese judgment, since it concerns the parent company and was the first case to be investigated and tried, although the judgment became final a few days after the Portuguese judgment. In legal terms, the acts constitute a continuing offence under Article 74 of the Spanish Criminal Code. However, the Spanish judgment took no more than partial account of certain acts committed in Portugal through the Portuguese subsidiary Forum Iniciativas de Gestão which affected other victims; moreover, it seems that the activities of the latter company continued in Portugal even after the activities of Fórum Filatélico had ceased in Spain once the company's assets were frozen in May 2006.
- 15 Under the case-law of the Court of Justice of the European Union established in the judgment of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683) and others, the question of whether the acts are actually the same is largely left to the discretion of the courts of the Member States. According to the traditional case-law of the Spanish Supreme Court, in cases such as the present one there is no *res judicata*. However, under Spanish Supreme Court case-law, the legal position in such cases must be addressed pragmatically on a case-by-case basis, and the penalty must be adjusted, either by subsequently combining the penalties in accordance with Article 76 of the Criminal Code or by applying the proportionality principle and establishing an upper limit on the sentence based on an assessment as a whole of all the acts comprised in a continuing offence (Article 74 of the Criminal Code).
- 16 According to Spanish case-law, the present case does not actually involve the same acts (*idem*), but a set of acts classified in law as a single continuing offence pursuant to Article 74 of the Criminal Code – a classification also found in Article 79 of the Portuguese Criminal Code – with the additional feature in this case that the continuing offence would encompass all the acts that took place in both Spain and Portugal, to which a single penalty should be applied.
- 17 In cases such as this, the problem lies in the legal approach to be adopted where the acts are not tried in a single set of proceedings and are not subject to a single judgment or a single sentence. Spanish case-law advocates a need to adjust sentencing to ensure that the penalty prescribed by law is proportionate, thereby avoiding the excess which may result from a double punishment. Two mechanisms have been used indistinguishably to achieve proportionality: the courts may either deduct the penalty imposed in the first judgment when sentencing in the second judgment, or they may ensure that, taken together, the penalties do not exceed the sentencing range for the offence in question.
- 18 In the present case there have been two separate trials, resulting in two judgments by courts in different Member States in respect of two fragments of the same continuing offence, with the relevant sentence being imposed in each trial. We are faced with a situation in which neither Spanish nor EU legislation or case-law lays down the procedure to be followed in such cases nor the procedural means for

establishing the upper limit on the sentence, which must be arrived at by making an assessment as a whole of all the acts comprised in the continuing offence as defined in Article 74 of the Criminal Code.

- 19 Article 988 of the Code of Criminal Procedure is the only provision which sets out a procedure in Spanish law for combining two or more convictions and establishes a sentencing limit, although it provides only for the application of the totality principle to sentences passed in respect of acts that are clearly different but which could have been judged in a single trial on the grounds that they are linked, in which case it applies the sentencing limit established in Article 76 of the Criminal Code. However, as we shall explain below, Article 14(2)(c) of Organic Law 7/2014 of 12 November 2014, which implements Framework Decision 2008/675/JHA in Spanish law, expressly excludes recognition of foreign judgments in such cases.
- 20 The present case does not fit precisely within Article 988 of the Code of Criminal Procedure. The offences do not involve exactly the same acts under the naturalist approach but, legally, neither are they merely linked offences; rather, they form a legal unity because they comprise a single continuing offence as provided for in Article 74 of the Criminal Code.
- 21 Nevertheless, the most feasible procedure for adjusting the penalties as required by the case-law would be to combine into a single sentence the sentences imposed in two or more judgments – whether Spanish or foreign – delivered in connection with acts that could have been judged in a single trial using, by analogy, the procedure established in the third paragraph of Article 988 of the Code of Criminal Procedure but in this case applying the sentencing limit laid down in Article 74 of the Criminal Code and adjusting the resulting final sentence to reflect the proportionality rule. It should also be noted that in such cases it is not possible to apply the penalty adjustment procedure established in Article 83(1) of Law 23/2014, in conjunction with Article 8(1) of Framework Decision 2008/909/JHA, because that provision addresses other circumstances and completely different situations.
- 22 It is necessary to outline here the criteria adopted by the Spanish judgment in the *Fórum Filatélico* case in order to determine the sentence for the continuing offence, in accordance with Article 74(2) of the Criminal Code. According to the judgment: (1) the basic sentencing range established in the Criminal Code for the offence of fraud is from 1 to 6 years' imprisonment plus a fine; (2) the thousands of offences of fraud that were committed were to be deemed a single offence of aggravated fraud; (3) therefore, the basic sentencing range for the offence had to be increased by one or two levels; (4) in the case in question it was considered appropriate to increase the range by one level; (5) as a result, the range was from 6 years and 1 day to 9 years plus a fine; and (6) the specific sentence imposed on the defendant was a custodial sentence of 8 years, 7 months and 17 days.

- 23 Consequently, when viewed as forming part of the same series of acts which constitute a continuing offence in law together with the acts that occurred in Spain, the acts committed in Portugal would not have had a significant impact on the sentence had they been tried alongside the acts committed in Spain and resulted in a single sentence, because, under the criterion used in the Spanish judgment to increase the basic sentencing range by one level, the overall sentence could not have exceeded 9 years' imprisonment.
- 24 It is at this point that the greatest discrepancy arises between Spanish law and EU law, namely that, where two sentences have been imposed following convictions in a Spanish court and in the court of another Member State, and the totality principle must be applied, any feasible solution necessarily requires the judgments of the court of the other Member State to be recognised and to be ascribed the same value, irrespective of whether they were delivered before or after the Spanish judgment, as stipulated by Framework Decision 2008/675/JHA. However, there is no provision in the Spanish legal system for such recognition in situations involving continuing or linked offences. Moreover, there is a rule of national law which expressly prohibits it, namely Article 14(2) of Organic Law 7/2014, which implements Framework Decision 2008/675/JHA.
- 25 This means that, in view of the direct effect of these restrictions, it is not feasible either to apply the totality principle or to adjust the Portuguese judgment to reflect the Spanish judgment, because the Portuguese judgment is not recognised in Spain for these purposes. Consequently, since execution of the EAW has been refused on the grounds that the requested person is a Spanish national, if the situation is deemed not to constitute a case of *bis in idem*, the only possible outcome is that the sentence imposed in Portugal must be served in its entirety in Spain, and it must be added to the sentence imposed by the Spanish judgment which is currently being served, with no scope to adjust or cap the sentence.
- 26 Not only does this situation have a bearing on the requirement for penalties to be proportionate to the offence (Article 49(3) of the Charter); it also compromises EU principles such as the mutual recognition of judicial decisions and the taking account of convictions within EU Member States, as established in Framework Decision 2008/675/JHA. It also adversely affects the feasibility of Article 4(6) of Framework Decision 2002/584/JHA and has an impact on the free movement of EU citizens (Article 45 of the Charter).