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The Examination of the Executing Authority on the European Arrest Warrant

The Transfer of Pro-Independence Politicians: Between Politics and Law

Abstract

Considering the European Arrest Warrant for the transfer of catalan separatist politicians, an issue that had remained rather unstudied until now has actually been raised: the extension of the examination of the executing judge. Some authors think that the transfer should be automatic. In this paper, it is argued that the examination should be superficial, but not as light as to allow an automatic transfer. The executing judge must at least verify the formal regularity of the order, as well as ensure that the facts correspond to the criminal category indicated by the issuing judge. Finally, the executing judge must superficially verify if the facts, as reported by the requesting judge, are not clearly false.

1. Introduction.

The judicial situation created as a result of the independence conflict in Catalonia is certainly paradoxical and surprising at every step. Political interpretations can be made about the behaviour of both sides during the conflict until its implosion with the failed declaration of independence of October 27, 2017, and of course also after that date. But history would only partly explain what happened legally from that moment. It's enough to say that in the account of the facts there are two radically opposed versions strongly defended: that of a good part of the Spaniards who support the union, who understand that what happened in Catalonia at that time was a terrible thing and really dangerous for Spain, and that of a minority of the Spanish population and practically all of the separatists. The latter defend that what happened was, without any doubt, a timely disobedience to the Spanish authorities, but not something that could even remotely threaten anyone as it was not materialized in any practical result, but it remained symbolic or simply political.

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These psychological perceptions, believe it or not, have conditioned many legal analysis on this matter. It is not a secret that ideology conditions the judges, and of course, any jurist. It is a fact that has been empirically studied for a long time[1]. The only hope is that this political commitment does not excessively predetermine the legal analysis, although a certain influence will always exist, unless the jurist who makes the study is indifferent to the a matter of substance[2], as it is hardly feasible, but not impossible, for it to happen with a Spanish jurist, but not with a foreign jurist.

In this specific case, a judge of the Spanish Supreme Court who acts as an investigator for this case, as well as the spanish General Prosecutor, have seen a crime of rebellion in what happened in Catalonia, as well as embezzlement related with the rebellion as the catalan Government and Parliament called for a referendum that had not been authorized by the spanish Government, and directly forbidden by the spanish Constitutional Court. As the materialization of an unauthorized referendum of that size must have presumably used public resources, the crime of embezzlement is also accused.

2. - The two lists of crimes of the Framework Decision.

There are other accusations, but they are secondary to what has already been indicated. Under the provisions contained in the *Council Framework Decision of 13 June 2002 concerning the European arrest warrant and the surrender procedures between Member States*[3], the main question to be resolved is what type of examination of the transfer request can perform the executing judicial authority[4]. Taking into account the ambiguity of the European regulation and also the fact that the Court of Justice of the

1 FORZA / MENEGON / RUMIATI, *Il giudice emotivo*, Bologna 2017, p. 107. EPSTEIN, Lee et al., "The Supreme Court During Crisis: How War Affects Only Non-War Cases", 80 *N.Y.U. L. Rev.* 1, 109-10, 2005. POSNER, Eduard A., *Cómo deciden los jueces*, Madrid 2011, passim.

2 SARMIENTO, Daniel, "Una prejudicial factible pero peligrosa", *Agenda Pública*, 10-4-2018, http://agendapublica.elperiodico.com/una-prejudicial-factible-pero-peligrosa/

3 JIMENO BULNES, Mar, "La orden europea de detención y entrega: análisis normativo", in Arangüena / De Hoyos / Rodríguez-Medel (ed.), *reconocimiento mutuo de resoluciones judiciales en la Unión Europea*, Cizur Menor 2015, p. 35. DALIA, Gaspare, "L'adeguamento della legislazione nazionale alla decisione quadro tra esigenze di cooperazione e rispetto delle garanzie fondamentali", in Kalb (ed.), *Mandato di arresto europeo e procedure di consegna*, Milano 2002, pp. 1 y ss.

4 Kovalkovas, 10-11-2016, C-477/16, 33, and Poltorak, 10-11-2016, C-452/16. See also Özçelik, 10-11-2016, C-453/16, 34-37, considering a "judicial authority" the hungarian public prosecutor.

European Union, in fact, has not specifically decided on this point[5], an interesting debate[6] has arisen about the margins of appreciation of the executing authorities[7].

The norms involved are arts. 2.2, 2.4 and 4.1 of the Framework Decision, transposed into various regulatory provisions of each Member State. These provisions distinguish two groups of crimes: a list of thirty-two criminal categories included in art. 2.2, and the rest of the crimes recognized by the criminal law of each State.

Referring to the former, the Framework Decision says that there will be no control over the double incrimination of the facts, that is, the traditional, classic need for extradition, that the facts have to be classified as a crime – the most equivalent possible – in the issuing State and in the executing State. Taking into account the "high level of confidence between Member States" mentioned in the explanatory memorandum of the Framework Decision –always referred by the case law–, but above all taking into consideration the numerous equivalences between the criminal codes of the Member States regarding such crimes[8], it is considered that it is not necessary to carry out the referred examination, so the transfer should be quite simple, although not really automatic.

Concerning the latter, the Framework Decision does not exactly provide an authentic analysis of double incrimination, but rather tries to establish a more flexible mechanism. According to this, the executing authority shall only make sure that the facts are abstractly criminal in its State, regardless of whether the constituent elements of the crime or its description do not coincide. Therefore, in this case too, the transfer shall take place in an agile manner, although not as much as in the previous case.

The fundamental difference between the two categories would be that the first one assumes that there are fairly equivalent categories of crimes among all Member States, so that there is no need to examine the matter carefully. But regarding the latter, taking into account the substantial differences between the criminal codes of almost thirty Member States, at least some kind of analysis is required, so as to analyze if the the facts specified by the issuing authority are an offense in the executing State.

Therefore, although there is a clear intention to simplify the old extradition procedure, in both cases there is an examination to be done by the executing authority. The intensity of this examination is what will be analyzed in the next sections.

5 See *Handbook on how to issue and execute a European arrest warrant*, OJEU 6-10-2017, (2017/C 335/01).

6 NIETO MARTÍN, Adán, "La cuestionable decisión de los jueces alemanes en el caso Puigdemont", *Almacén de Derecho*, 8-4-2018, http://almacendederecho.org/reconocimiento-mutuo-doble-incriminacion/

7 See BAN FUGLSANG MADSEN SORESNSEN, Henning "Mutual trust – blind trust or general trust with exceptions? The CJEU hears key cases on the European Arrest Warrant", *EU Law Analysis*, http://eulawanalysis.blogspot.com.es/2016/02/mutual-trust-blind-trust-or-general.html and SUOMINEN, Annika, "Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts", *European Criminal Law Review*, vol. 4, 3, 2014.

8 See. DE HOYOS SANCHO, op. cit. p. 62.

3. - The examination on the occasion of the thirty-two criminal categories of art. 2.2.

About those thirty-two privileged criminal categories, the provision says nothing more than what is indicated concerning the non-examination of the double incrimination. However, as it has been said, all this is based on the reasonable homogeneity of these criminal categories in all Member States. Some of them are very serious crimes, such as terrorism, and some are more traditional crimes such as fraud.

The explanatory memorandum of the Framework Decision, in point 5, offers the essential keys of the system, which should be remembered:

> "*The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.*"

Therefore, the fundamental expressions would be: the European Union as "an area of freedom, security and justice"; "abolishing extradition"; "simplified system of surrender of sentenced or suspected persons "; "free movement of judicial decisions in criminal matters". The case law of the Court of Justice of the European Union, in order to develop these ideas, has repeatedly reminded that there is an obligation to execute[9], and that States can not create causes of refusal other than those provided very restrictively in the Framework Decision, as it was the case sometimes[10]. Furthermore, those grounds for refusal, except in the case of art. 4a[11], can not be based on the lack of respect of fundamental rights by the issuing State presumed by the judge of the executing State[12], because the system itself is based on the existence of an equivalent minimum standard of protection throughout the European Union, and only in exceptional

9 Ardic, 22-12-2017, C-571/17, 69-70. Dworzecki, 24-5-2016, C-108/16, 27. Kovalkovas, 10-11-2016, C-477/16, 26-28.

10 F., 30-5-2013, C-168/13, 36. Poplawski, 29-6-2017, C-579/15, 19. Tupikas, 50.

11 Dworzecki, 24-5-2016, C-108/16, 50: "*Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.*". Zdziaszek, 10-8-2017, C-271/17, 100-104.

12 Radu, 29-1-2013, C-369/11, 36-38. Aranyosi y Căldăraru, 5-4-2016, C-404/15 y C-659/15, 80-82.

circumstances could the transfer be suspended, following a decision of the Council of the European Union in the matter[13].

But this doesn't mean that the analysis of the executing authority must be "automatic"[14]. On the contrary, the fact that the European legislator wanted precisely a judicial authority as the executing institution means that a sufficient judicial control[15] is precisely desired. In addition, the judicial authority must ensure that the defendant's rights are respected in the executing State during the process of decision of the european arrest warrant[16], in accordance with the European Convention on Human Rights and the executing State's own law[17].

In any case, the executing authority must necessarily examine the following points:

1. Formal requirements: identification of the defendant and the issuing authority (Article 8.1.a and b) and indication of the national judicial resolution in which the conviction or detention is ordered (Article 8.1.c)[18].
2. If the facts specified by the issuing authority correspond, *prima facie*, with the criminal category also stated in the country of the judge required (Article 8.1.d).
3. Whether the facts are clearly false or not (Article 8.e).

Leaving aside the first point, which is in principle not very controversial[19], the examination of points 2 and 3 is neither complex nor requires much effort. It is an examination that is even superficial, the at least desirable to understand the request and be able to give a rational and therefore motivated[20] response quickly, as required by the case law[21].

Therefore, it is not something that can be eluded, as the Framework Decision imposes the obligation to execute the delivery orders, but not blindly[22], because otherwise there would be no list of thirty-two preferential crimes or anything like that. It would be enough for the issuing State's authority to say the name of the defendant

13 See Melloni, 26-2-2013, C-399/11, S. F., 30-5-2013, C-168/13, 49.
14 See AMBOS, Kai, "¿Reconocimiento mutuo versus garantías procesales?", en AAVV (De Hoyos coord.), *El proceso penal de la Unión Europea*, Valladolid 2008, p. 30.
15 See F., 30-5-2013, C-168/13, 45.
16 PÉREZ MARÍN, Mª Ángeles, *La lucha contra la criminalidad en la Unión Europea*, Barcelona 2013, p. 222. ARANGÜENA FANEGO, Coral, "Garantías procesales de los sospechosos e imputados", en AAVV (De Hoyos coord.), *El proceso penal de la Unión Europea*, Valladolid 2008, p. 44, specially p. 137.
17 F., 30-5-2013, C-168/13, 48.
18 Arrest must be an effective lack of freedom, not just a movement restriction. Vid. S. JZ, 28-7-2016, C-294/16.
19 See NIEVA FENOLL, "Un varapalo de la Justicia belga", *Agenda Pública*, 16-5-2018. http://agendapublica.elperiodico.com/un-varapalo-de-la-justicia-belga/
20 See § 32 *Gesetz über die internationale Rechtshilfe in Strafsachen*.
21 Pietrowski, 23-1-2018, C-367/16, 58-59.
22 See RUZ GUTIÉRREZ, Pablo, "Cuestiones práctics relativas a la orden europea de detención y entrega", en AAVV (Arangüena / De Hoyos / Rodríguez-Medel), *reconocimiento mutuo de resoluciones judiciales en la Unión Europea*, Cizur Menor 2015, p. 94.

along with the identification of a crime so that it could be transfered immediately, without further analysis.

I think that everyone would agree that it is not enough for the issuing authority to say "terrorism", demanding the transfer of a person, but it will be necessary for the issuing judge to motivate, even shortly, that his/her investigations prove that, in fact, the person whose transfer is claimed is a terrorist. Otherwise it would be enough to mention the identification of a person and to attribute one of the thirty-two criminal categories, without more explanations, which could be fallacious. Mutual trust[23] obviously exists and the Court of Justice of the European Union always insists on it, giving credibility by default to what was stated by the issuing judge[24]. But this trust must be based on the loyal behaviour of the authorities involved, because trust does not exist to be betrayed by taking advantage of it.

Therefore, the issuing authority must analyze whether the facts belong to one of the thirty-two categories (Article 8.1.d), in order to verify that the issuing authority is not taking advantadge of the mutual trust in order to avoid the examination of the double incrimination, mentioning for example a a crime of the privileged list when in fact the issuing authority is prosecuting another crime that is not on that list. Or, that the issuing judge is telling facts that are not even the crime the issuing judge is referring to. That is, therefore, a very elementary[25] but unavoidable analysis, and that's why it is mentioned in the first place (2).

Just afterwards (3) the executing authority must analyze if the facts expressed are *prima facie* false or not. Obviously it will not be able to enter into the analysis of whether they are authentic or not, because this would require an evidentiary assessment that not only goes beyond the possibilities of the European order, but would place the executing authority in a scenario in which without direct knowledge of the matter, it would evaluate it as if it were the case. And in addition, this would imply in my opinion an excess in its functions, usurping the competence of the issuing authority. That competence must be respected in any case, because otherwise the national sovereignty of another State would be violated.

But the situation changes completely if the facts narrated by the issuing judge are clearly false. The issuing judge can reach this very hard conclusion in two ways. The first, because the facts are notorious and were not told properly by the issuing authority. It is the least frequent, but also the situation in which is more easily to discover that there is bad faith on the part of the issuing judge. The second is the most common: the facts, as they are reported by the issuing authority itself and without further investiga-

23 See DE HOYOS SANCHO, Montserrat, "Armonización de los procesos penales, reconocimiento mutuo y garantías esenciales", en AAVV (De Hoyos coord.), *El proceso penal de la Unión Europea*, Valladolid 2008, p. 44, specially p. 58.

24 See Mantello, 16-11-2010, C-261/09, 50-51.

25 See the italian law of 22-4-2005, n. 69 (*Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri*), art. 18.1.t.

tion, appear to be false, even after the issuing judge has made an extension of the information at the request of the executing judge, extension which is fully acceptable[26].

It may be surprising that the executing judge can enter into this type of analysis. But these analyses are logical and not only viable, but essential under the domestic law in any State in a situation analogous to the one analyzed here. For example, if in Spain a judge in Santander requests from a judge in Seville the competence to judge a case and therefore to decide on the freedom of the accused. The Santander judge, for example, would make that request saying that he is investigating a related crime whose penalty is greater than the one being investigated by the judge of Seville (Article 18.1.1 LECrim). Nobody would think that the Judge of Seville is not going to make at least a superficial analysis of the existence of that related crime, specially because he would unduly hand over his competence to those who claim it without cause. Moreover, if the facts were indeed clearly false, the judge would have no choice but to inform the prosecutor's office and the General Council of the Judiciary of his partner's behavior. In Europe, things could not go that far, but the international discredit of the issuing judge would be huge.

This examination is not invasive at all, nor it harms the sovereignty of any State, nor the execution of the European arrest warrant. It is an analogous examination to that existent in art. 269 of spanisch Criminal Procedure Code[27] when it comes to the admission of sues. The judge, or the prosecutor or even the police must analyze whether the facts are *prima facie* to be qualified as a crime and if they are not clearly false. It would not be understood that no longer in the internal sphere, but in the international and in this much more comitted situation, the executing judges could not carry out such an examination, also in the framework of mutual trust existing between the countries of the European Union.

4. - The examination on the occasion of other crimes.

With the rest of the crimes obviously will be the same examination undertaken as explained above, adding some sort of double incrimination analysis[28], but not in the most classical sense, which permitted the States considering extradition within a political background. The Framework Decision sought to limit absolutely this political manners[29], by making the transfer decision a strictly legal one, so that the authority of the

26 See the before mentioned Handbook, p. 24.

27 "*Formalizada que sea la denuncia, se procederá o mandará proceder inmediatamente por el Juez o funcionario a quien se hiciese a la comprobación del hecho denunciado, salvo que éste no revistiere carácter de delito, o que la denuncia fuere manifiestamente falsa. En cualquiera de estos dos casos, el Tribunal o funcionario se abstendrán de todo procedimiento, sin perjuicio de la responsabilidad en que incurran si desestimasen aquélla indebidamente.*"

28 See Grundza, 11-1-2017, C-289/15.

29 See NIETO MARTÍN, Adán, "La cuestionable decisión de los jueces alemanes en el caso Puigdemont", *Almacén de Derecho*, 8-4-2018, http://almacendederecho.org/reconocimiento-mutuo-doble-incriminacion/

executing State does not make a strict examination of double incrimination -which would expand the political margin in function of the degree of equivalence demanded discretionally-, but something more generic and, therefore, more generous for the possibilities of the transfer. That is the intention of arts. 2.4 and 8.1.e of the Framework Decision.

And this is so because the examination of the double incrimination can be absolutely arbitrary. Unless a country has literally copied in its laws the text from the criminal code article from the issuing country, its judges could always say that the crime-category does not correspond completely with the provisions of its law and, therefore, the transfer is denied. This is exactly what Art. 2.4 is saying when it asserts that the equivalence is not even sought, but simply it shall be verified if the facts submitted to examination are a crime in the executing State.

However, even such a generous analysis must have limits. There is a list of thirty-two privileged crimes because, among other reasons, it has been considered, as indicated, that these crimes are fairly homogeneous among the different criminal laws of European States and that they are even punished with at least similar penalties, although there is tremendous contrast in this last field. But at least in these cases States wished to sanction undoubtedly those great categories of criminal acts.

But regarding the crimes that fall outside the list, it is necessary to proceed with greater caution, because it is not the intention of any State to relinquish its sovereignty so that another State can do what it wants with an accused who is in its territory. This would mean assuming the grieviousness of a conduct that is not considered so serious in the executing State, or even is not a crime, as stated in art. 2.4. It would be contradictory to send someone to a territory to be sanctioned for a crime that is not such in the state in which the defendant is[30]. The transfer in these cases may or may not have political motivations, but in any case, is substantially aberrant.

For this reason, the analysis must be made in particular by asking the executing authority the question of whether those facts, as they have been described by the issuing authority, and provided they are not clearly false, are also a crime in the executing country. But not any crime, but a crime always within the generic criminal category enunciated by the issuing State, although this is normally not difficult, at least in the European law culture.

This is so because the intention of the European provision with the offenses of this second list is not that the executing judges are even more generous than when considering the crimes of the first list, but that they are more careful and expand their examination. And therefore, if with the crimes of the first list it seems reasonable that there were a correspondence between the category claimed by the issuing State and the one considered by the executing State, that same coherence must be demanded -although always with flexibility- when the crimes of the second list are considered, at least regarding the protected legal asset, which, although it shall not be identical, should at least be comparable.

30 See Pietrowski, 23-1-2018, C-367/16, 38.

Not otherwise can be interpreted art. 4.1 of the Framework Decision when it argues that in the matter of customs and exchange rates and taxes, the transfer can not be rejected due to the fact that the requested State does not provide in its legislation the same type of taxes or fees. If these wouldn't be the words of art. 4.1, it could be assumed that the non-payment of taxes, in general, could be qualified by the executing authority under any legal title. However, what the Framework Decision seems to say is that it will be possible to check whether this legal title is the same or equivalent, within the usual double incrimination examination. But once that operation is done, it should not be analyzed if the taxes would be due or not in the executing State. If this verification were not necessary, the reference of the Framework Decision to the detail of the taxes would be dispensable.

Therefore, to the examination expressed in the previous section regarding the existence of a fact with the characteristics of the offense indicated by the issuing authority, as well as the analysis of whether the fact is clearly false or not, it must now be added that the fact is also a crime in the executing State, what is quite obvious in the thirty-two categories mentioned above, but not in the rest of the cases. And for this reason, judicial verification is necessary.

5. - The case of pro-independence politicians.

In the case at hand, as was previously mentioned, the crimes of rebellion and embezzlement are being attributed to various persons present in the United Kingdom, Belgium and Germany. I leave aside the situation of the politicians who are in Switzerland because this country follows the old extradition system.

Regarding these cases and regardless of the many and somewhat bizarre vicissitudes experienced in this thorny issue, up to now we have the decision of a Scottish judge who has postponed his consideration of the case for a long time, probably because of the awareness of the background envolved, clearly and arbitrarily exceeding the resolution deadlines set by the Framework Decision. The Belgian Justice has declined to hear the merits of the case on the pretext that the european arrest warrant was not based on a national arrest warrant that was consistent with that european arrest warrant in terms of the crimes charged, which was not really true and sounds very much, again, to a willingness to avoid a decision in this complex issue for political reasons above all[31].

Finally, the German judges decided not to enter into the analysis of the rebellion, since it seems absolutely clear to them that the facts, as they had been narrated by the issuing judge, were not that crime or any other crime in Germany. Although it caused disappointment in a sector of the Spanish legal profession, perhaps this decision could be better understood from the point of view of the principle of minimal intervention and, above all, from the evidence that even if the facts were true as the issuing magis-

31 NIEVA FENOLL, "Un varapalo de la Justicia belga", *Agenda Pública*, 16-5-2018. http://agendapublica.elperiodico.com/un-varapalo-de-la-justicia-belga/

trate had told them, they did not constitute a crime of rebellion, a conclusion that, incidentally, was also shared by not a few jurists[32], by an essential absence of insurrectionary violence in what happened in Catalonia.

Now the German judges must carry out the analysis that the Belgians avoided and the Scottish judge postponed. That is, the analysis described in the previous sections, particularly in the third, because the crime of embezzlement was placed by the Spanish magistrate in the category of "corruption".

This examination, as already said, is fairly simple but not automatic. The German judges must establish whether the misuse described by the issuing judge in this case falls within the category of "corruption". This could pose interpretation problems from the perspective of international regulations about this point[33], but this issue is not to be discussed in this paper.

And on the other hand, it is also necessary to carry out the aforementioned *prima facie* evidence examination of the facts, which is more necessary in this case, because the initial request for the transfer hardly justified the existence of this crime; this was really striking. It is expected that the spanish judge complements efficiently the information initially sent.

The outcome of these processes is very uncertain. Usually the transfers are quite automatic because the facts are not controversial and do not have problems of legal qualification or any political background. But in this case the political background is obvious and the crimes are certainly unusual, especially in the case of rebellion. Some law of transposition, like the Italian one, refers expressly to this topic[34].

The mechanism of the european arrest warrant wanted to separate politics from these decisions, but it did not establish mechanisms for the judges involved to also remove them from their minds. And believe it or not, that factor in this case, although it may not have any influence in the final decision, has alerted the executing judges an prevented any automatism. All in all, this judicial decision will be in the headlines of much of the world press.

32 http://www.lavanguardia.com/politica/20171123/433106313410/centenar-penalistas-carga-contra-proceso-maza-lamela-independentistas.html

33 See. art. 17 de la United Nations Convention against Corruption 31-10- 2003; art. 14 Criminal Law Convention on Corruption 27-1-1999 of the Council of Europe.

34 Art. 18.1 of italian law of 22-4-2005: *La corte di appello rifiuta la consegna nei seguenti casi: a) se vi sono motivi oggettivi per ritenere che il mandato d'arresto europeo è stato emesso al fine di perseguire penalmente o di punire una persona a causa del suo sesso, della sua razza, della sua religione, della sua origine etnica, della sua nazionalità, della sua lingua, delle sue opinioni politiche o delle sue tendenze sessuali oppure che la posizione di tale persona possa risultare pregiudicata per uno di tali motivi.*