

AG Opinion in EAW Case against Rapper: Legislation at Time of Offence Governs Interpretation of Thresholds

Thomas Wahl

On 26 November 2019, Advocate General (AG) *Michal Bobek* issued his [opinion in the extradition case of rapper Valtònc](#). The CJEU has to interpret Art. 2(2) of the 2002 Framework Decision on the European Arrest Warrant (FD EAW) following a request for preliminary ruling by the Court of Appeal of Ghent, Belgium. The background of the case (C-717/18) is as follows:

In 2017, the National High Court of Spain convicted *Josep Miquel Arenas* (who performs under the name Valtònc) to 3.5 years of imprisonment for rap songs that he published online in 2012 and 2013. The most severe sentence (2 years) referred to the offence of “glorification of terrorism and the humiliation of the victims of terrorism”. At the time of the commitment this was the maximum sentence laid down for this offence in the Spanish Criminal Code. In 2015, however, Spain amended the offence and introduced a maximum of three years of imprisonment for “glorification of terrorism and the humiliation of the victims of terrorism.” The rapper fled Spain to Belgium where he lives since 2017. In 2018, the Spanish authorities issued a European Arrest Warrant to Belgium for the purpose of executing the custodial sentence of 2017. In the EAW form, the Spanish authorities ticked the box “terrorism” with regard to the offences that gave rise to penalty. As a consequence, the double criminality requirement is not to be verified by the executing Belgian authorities in accordance with Art. 2(2) FD EAW. Art. 2(2) stipulates, however, that in these cases the offences must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years and as they are defined by the law of the issuing Member State.

By its reference for preliminary ruling the Ghent Court of Appeal seeks clarification which version of the Spanish criminal law is relevant in order to determine the “minimum maximum threshold” in Art. 2(2) FD EAW. Is the reference point the maximum custodial sentence applicable to the case at hand, i.e. the law that applies when the offence was committed (here: 2 years, as the offences were committed in 2012/2013)? Or is it the maximum sentence provided for by the national law in force at the time of issuing the EAW (here: 3 years following the amendment of the Spanish Criminal Code in 2015)?

AG *Bobek* clearly favours the first approach. He recommends the CJEU deciding that Art. 2(2) FD EAW refers to the criminal legislation applicable in the issuing State to the specific criminal offence(s) to which the EAW relates. In other words, it is the law actually applicable to the facts of the case to which recourse has to be made in order to assess the maximum threshold of at least three years – the precondition to dispense with the verification of double criminality. According to the AG, this conclusion results from the context of the provision and the purpose of the FD. Although the CJEU’s case law is guided by the principle that an EAW can

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be denied only exceptionally, the AG underlines that other values, such as fundamental rights, must be respected too. He also makes a distinction between a “structural effectiveness” of the FD and an “individual effectiveness” (effectiveness of a specific EAW in an individual case). The latter is difficult to translate into generally efficient and operational rules.

In its final remarks, the AG stresses several issues that are problematic in the case at issue, but are not subject of the questions brought to the CJEU. These issues include the significance of the fundamental right of freedom of expression in the present criminal case; the question whether the “glorification of terrorism and the humiliation of the victims of terrorism” can be subsumed under “terrorism” in the list of the 32 offences for which the verification of double criminality is excluded in the FD; and the effect of the interpretation of Art. 2(2) on Art. 2(4) FD EAW.

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