

CJEU Clarifies Scope of Ne Bis in Idem Principle Involving Sentences by Third Countries



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News

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On 29 April 2021, the CJEU delivered a judgment on interpretation of Art. 4(5) of the Framework Decision on the European Arrest Warrant (FD EAW) for the first time. It also decided that convictions combined with leniency measures in third countries can be a ground for refusing the execution of an EAW. The case referred is [C-665/20 PPU \(X\)](#).

Facts of the case and questions referred

In the case at issue, X was sought by German authorities for several criminal offences because he had allegedly committed acts of exceptional violence against his partner and daughter in Berlin. X was detained in the Netherlands on the basis of the German EAW but he opposed his surrender by arguing that he had already been tried for the same acts in Iran. More specifically, he had been acquitted in respect of some of the acts and sentenced in respect a number of other acts to a term of imprisonment of seven years and six months. X claimed that he had almost fully served the sentence, the remainder having been remitted as part of a general amnesty measure proclaimed by the Supreme Leader of the Revolution to mark the 40th anniversary of the Iranian revolution.

X invoked Art. 4(5) FD EAW, which has also been transposed into Dutch law. Art. 4(5) FD EAW stipulates: “The executing judicial authority may refuse to execute the 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 sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.” This optional ground for refusal is similar to the mandatory ground for refusal in Art. 3(2) FD EAW, with the exception that the latter refers to a judgment handed down by an EU Member State, not “by a third State.”

The doubts of the referring Rechtbank Amsterdam concerned whether it has a margin of discretion (although Dutch law does not provide for one) and how it must interpret the concept of “same acts.” They also concerned the scope of the “enforcement condition” (i.e., “sentence has been served ... or may no longer be executed...”).

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Findings of the CJEU

The CJEU ruled first that – contrary to Art. 3(2) – the executing court must have a margin of discretion when it applies the refusal ground based on Art. 4(5) FD EAW. Otherwise, an optional ground for refusal would turn into a genuine obligation to refuse EAWs if the person had already been tried in a third country.

Second, the CJEU clarified that the concepts in Art. 4(5), such as “same acts,” must be interpreted in the same way as those in Art. 3(2) FD EAW. Therefore, the concept of “same acts” refers to the nature of the acts, encompassing a set of concrete circumstances that are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.

Third, the judges in Luxembourg stated that the enforcement condition is met in the present case. The emphasis is on the wording of Art. 4(5) FD EAW, which refers to the “law of the sentencing country,” namely that all leniency measures provided for in the sentencing third country should be recognised if they have the effect of terminating the imposition of the sanction. Circumstances like the seriousness of the acts, the nature of the authority granting remission, and whether or not the measures are based on policy considerations have no impact.

The executing court must strike a balance, however, when exercising its discretion on the refusal ground. Therefore, the national courts must reconcile the prevention of impunity and combating crime with ensuring legal certainty towards the person concerned, including respecting final decisions from foreign public bodies.

Put in focus

In the first two points, the CJEU follows the [opinion of Advocate General \(AG\) Hogan](#), which was released on 15 April 2021. For the third question, however, the AG concluded that the Iranian leniency measure is not covered by Art. 4(5) FD EAW. (TW)

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