

CJEU: Consequences of Failure to Refer to Additional Sentence in EAW

Thomas Wahl

News

On 6 December 2018, the CJEU delivered its judgment in [Case C-551/18 PPU](#), which concerns the execution of a European Arrest Warrant (EAW) issued against IK. The judgment mainly concerns the interpretation of Art. 8 FD EAW (entitled “content and form of an EAW”), but also Art. 15 (communication of supplementary information) and Art. 27 (rule on speciality).

Facts of the Case

In the case at issue, IK was sentenced to a primary custodial sentence of three years for sexual assault (main sentence). In the same judgment, the court ordered an “additional sentence of release conditional to placement at the disposal of the *strafuitvoeringsrechtbank* (Court for the enforcement of custodial sentences) for a 10-year period.” Under Belgian law, this additional sentence takes effect after the expiry of the main sentence and, for the purpose of its enforcement, the Court responsible for the enforcement of custodial sentences is to decide whether the convicted person must be deprived of liberty or whether he can be released conditionally. Accordingly, the person “shall be deprived of his liberty if there is a risk of him committing serious offences that undermine the physical or psychological integrity of third parties which, in the context of release under supervision, cannot be offset through the imposition of special conditions.”

Since IK had left Belgium, the Belgian judicial authorities issued a EAW against him for the enforcement of the sentence. They indicated the main sentence, the nature and legal classification of the offences and the relevant legal provisions, and outlined the facts, but did not mention the additional sentence imposed on IK. The *Rechtbank Amsterdam/the Netherlands*, ordered the surrender of IK to Belgium for the purposes of serving the custodial sentence in Belgium for the offense of sexual assault.

IK was surrendered and put in custody for the main sentence. In the subsequent proceedings before the Court for the enforcement of custodial sentences in Antwerp/Belgium, which decided on the additional sentence, IK claimed that the court cannot take this decision because the additional sentence was not subject to the surrender by the Dutch authorities.

In the following, the Dutch authorities denied a request by the Belgium authorities, which sought additional authorisation in respect of the additional sentence pursuant to Art. 27 FD EAW. The Dutch authorities argued that Art. 27 concerns the sentencing or prosecution of an offence other than the one for which surrender was authorized, which did not apply to the present case.

The Antwerp court then rejected IK’s arguments and ordered the maintenance of his deprivation of liberty.

Reference for the Preliminary Ruling

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Upon appeal, the *Hof van Cassatie* (Court of Cassation) decided to refer the case to the CJEU, asking about the impact of the failure to mention the additional sentence in the EAW on the further proceedings regarding this sentence in Belgium.

The main question was, in essence, whether non-compliance with Art. 8(1)(f) of the FD EAW, which provides for the necessity to include in the EAW request the penalty imposed, precludes the enforcement of the additional sentence.

Decision and Reasoning of the CJEU

At first, the CJEU reiterated the main principles of the EAW scheme that had already been mentioned in previous judgments:

- The EAW is based on mutual trust that requires each of the EU Member States, save in exceptional circumstances, to consider all the other Member States to be in compliance with EU law and particularly with the fundamental rights recognised by EU law;
- Based on the principle of mutual recognition, the EU system of surrender replaces the conventional multilateral system of extradition;
- The FD EAW seeks to facilitate and accelerate judicial cooperation by contributing to the attainment of the Union's objective of becoming an area of freedom, security and justice;
- The FD EAW pursues the policy that the crime committed does not go unpunished;
- Refusal to execute a EAW is only possible on the grounds for non-execution exhaustively listed in the FD EAW (Arts. 3-5); accordingly, execution of the EAW is the rule, whereas refusal is the exception.

Although the CJEU decided that failure to comply with the formal requirements of Art. 8(1) FD EAW can result in the executing authority not giving effect to a EAW (cf. Case C-241/15, *Bob-Dogi*, [eucrim 2/2016](#), p. 80), the CJEU observes that it must be examined to what extent failure to indicate an additional sentence in a EAW affects the exercise of jurisdiction that the executing authority derives from Arts. 3-5 FD EAW.

The CJEU put forth that the purpose of Art. 8(1)(f) is to give information, so that the executing authority can decide whether it has to refuse the EAW because the thresholds of Art. 2(1) FD EAW for the execution of a custodial sentence (min. four months) have not been ascertained. In the present case, this threshold was unproblematic (the main sentence against IK was three years' imprisonment). Hence, the executing authority could do nothing but grant the surrender.

As a result, the CJEU ruled that, in circumstances such as those at issue in the main proceedings, the fact that the European arrest warrant did not indicate the additional sentence cannot affect the execution of that sentence in the issuing Member State following surrender.

Subsequently, the CJEU dealt with several counterarguments and dismissed them. In particular, it reasoned as follows:

- The rule of speciality, as referred to in Art. 27 FD EAW, does not apply in the present case, because it only concerns offences other than those on which the surrender was based;
- Failure to indicate the additional sentence does not trigger the reporting mechanism of Art. 15(3) FD EAW; therefore, the executing judicial authority need not be informed of the additional sentence in advance.

Ultimately, the CJEU pointed out that the rights of the person concerned were guaranteed. He can challenge the maintenance of the deprivation of liberty before the Belgian courts.

Put in Focus

After the *Bob-Dogi* judgment, the CJEU delivered another judgment on the consequences of failure to comply with the formal requirements of an EAW. In essence, it links the requirements of Art. 8 FD EAW with the substantial refusal grounds in Art. 3 et seq. FD. If the failure to comply formally has no effect on the jurisdiction of the executing authority, enabling it to apply one of the listed refusal grounds, the formal failure is negligible. The person concerned is referred to the legal remedies as provided for in the legal order of the issuing state.

The judgement also clarifies the applicability of the rule on speciality (Art. 27 FD EAW) and the scope of the reporting mechanism of Art. 15(3) FD EAW.

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