

CJEU: Surrender of Resident if Executing State Unable to Enforce Custodial Sentence

Thomas Wahl

On 13 December 2018, the CJEU decided on a request for a preliminary ruling that concerned the interpretation of Art. 4 No. 6 FD EAW in conjunction with the divergent levels of sanctioning among the EU Member States.

Facts of the Case

In the case at issue (*C-514/17 – Sut*), Belgium was requested to execute a one-year-and-two-month custodial sentence against *Marin-Simion Sut* for having driven a vehicle without valid licence plates and without, for not having a valid driving licence, and for having caused an accident. Mr. Sut is a Romanian national, but has lived in Belgium since 2015 where he is working with his spouse. In the proceedings on the execution of the Romanian arrest warrant, the Belgian Public Prosecutor argued that the Belgian provision implementing Art. 4 No. 6 FD EAW cannot be applied. According to Art. 4 No. 6 FD EAW, the execution of an EAW may be refused “if the EAW has been issued for the purposes of execution of a custodial sentence, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence in accordance with its domestic law.”

The Legal Question

The Belgian Public Prosecutor affirmed that Mr. Sut is a “resident staying in the executing Member State” within the meaning of Art. 4 No. 6 FD EAW. According to Belgian law, however, the offenses at issue can be punished by fines only, but conversion of a custodial sentence into a fine is expressly prohibited. Therefore, the Romanian sentence cannot be enforced in Belgium and the EAW must be executed, hence Mr. Sut surrendered.

The referring *Cour d’appel de Liège* (Court of Appeal, Liège) had doubts on this interpretation with regard to previous CJEU case law, which stresses the importance of the requested person’s reintegration into society when the sentence imposed on him expires.

Decision and Reasoning of the CJEU

The CJEU pointed out that the optional ground for non-execution according to Art. 4 No. 6 FD EAW requires two conditions to be satisfied in the case at issue:

- The person requested must be a “resident” of the executing Member State;

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- The custodial sentence passed in the issuing state against that person can actually be enforced in the executing state (while the latter can consider that there is a legitimate interest which would justify the execution of the sentence).

The CJEU further noted that Union law allows a certain margin of discretion when implementing Art. 4 No. 6 FD EAW. In addition, the more the national legislator limits the situations in which its national authorities may refuse surrender, the more they reinforce the surrender system in favour of building up an area of freedom, security and justice.

Against this background, the CJEU recognised the importance of potentially increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires, but this cannot prevent a Member State from limiting the refusal grounds such to give effect to the fundamental principle of mutual recognition enshrined in Art. 1(2) FD EAW. Therefore, the executing authority may give effect to an EAW if the executing state is not able to actually enforce the custodial sentence.

This is a rather unfavourable result for the requested person. The CJEU, however, left one back door open: the Belgian courts must ascertain whether the consequence in the case at issue (i.e., Belgium not being in the position of enforcing the custodial sentence) is really indispensable under Belgian law. In this context, two issues must be considered:

- Art. 4 No. 6 FD EAW does not give any indication that the executing authority is precluded from refusing the execution of a EAW if the law of this state provides only for a fine in response of the offence to which the EAW relates;
- The margin of discretion for the national legislator when implementing Art. 4 No. 6 FD should be taken into account.

As a result, it is ultimately up to the referring court whether the Romanian EAW must be executed, even though the defendant has economic and family ties in Belgium and enforcement is only hindered because Belgium foresees a lighter penalty for the offense at issue

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