

# ECJ Ruled on the Prohibition of Double Jeopardy in Fraudulent Pyramid Schemes

Thomas Wahl

In a case concerning the European arrest warrant (EAW), the ECJ ruled on the scope of the principle *ne bis in idem* in cases of fraudulent pyramid schemes.

In the underlying case (*C-164/22, Juan*), a CEO of two companies is defending himself against his extradition from Spain to Portugal. The CEO used a company in Spain and a company in Portugal, both of which he controlled, to establish the sale of investment products. The massive uptake of those investment products by individuals allowed the Portuguese company to experience exceptional growth and expansion. Following the intervention of the Spanish judicial authorities in spring 2006, and afterwards that of the Portuguese judicial authorities, the companies ceased their activities, which led to significant financial losses for the investors.

The CEO is serving a prison sentence of 11 years and 10 months in Spain for serious fraud and money laundering. He objects the execution of an EAW issued by Portugal for the purpose of executing a Portuguese sentence of over six years for serious fraud. He claimed that the Portuguese judgment is based on the same facts on which the Spanish judgment is based and therefore the prohibition of double jeopardy applies. The referring High Court of Spain asks the ECJ whether the case involves a single continuing offence, so the CEO is protected by the principle that no one may be tried or punished twice in criminal proceedings for the same criminal offence within the EU.

In its [judgment of 21 September 2023](#), the ECJ ruled that the principle *ne bis in idem* does not preclude the execution of the EAW. The principle *ne bis in idem* is only applicable if the facts for which the person concerned is serving a sentence in a Member State are identical to the facts on which the EAW is based. Thus, there must be a set of concrete circumstances stemming from events which are inextricably linked together in time and space.

According to the ECJ, the use of an identical *modus operandi* may argue in favour of the "same facts". However, the following circumstances refute this assumption: the activities were carried out via separate legal entities; the fraudulent activity continued in Portugal although investigations were opened in Spain and activity there ceased; the Spanish judgment relates to the investors residing in Spain whereas the Portuguese judgment deals with the detriment of persons residing in Portugal.

On the basis of this interpretative guidance from the ECJ, the Spanish High Court must now decide whether it considers the offenses to be identical.

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