Revija za evropsko pravo: XX (2018) 2-3.

Ivica Josifovic, PhD*

Igor Kambovski, PhD**

UDK: 343.1(4-672EU)
str. 75-89.

THE PUIGDEMONT CASE: THE EUROPEAN ARREST WARRANT AND MUTUAL TRUST AT RISKS

Abstract

The recent Carles Puigdemont case confirms that European criminal law, in particular the European Arrest Warrant (EAW) system, is in crisis of confidence. The paper elaborates case facts, as well as the ruling of the German's Higher Regional Court of Schleswig-Holstein that rejected the EAW issued by Spanish authorities for the offence of rebellion due to a lack of double criminality. The paper, also suggests that the crisis has been made by rejecting the possibility to refer the issue to the Court of Justice of the European Union (CJEU) for a preliminary ruling procedure in order additionally to determine the EU's law on double criminality criteria. It brought to a reduction in mutual trust among member-states, as the Spanish judiciary was deemed side-lined and the EAW system questioned. The conclusion point the need of strengthening the mutual trust among member-states, as well as greater involvement of the CJEU and eventual handling of the case by the European Court on Human Rights.

Keywords: European Arrest Warrant, Puigdemont, Double criminality, court.

I Introduction

European Arrest Warrant (EAW) is an EU's criminal law legal instrument, applicable among EU's member-states judicial authorities, according the mutual

* Associate Professor, Faculty of Law University of Goce Delcev-Stip; ivica.josifovik@ugd.edu.mk. Rad je primljen 17.12.2019.

** Associate Professor, Faculty of Law University of Goce Delcev-Stip; igor.kambovski@ugd.edu.mk.

recognition principle, where the extradition procedure is replaced by simplified and faster procedure.[1] A member-state issuing an arrest warrant may require that the same is done in any other EU member-state. The Framework Decision on the European Arrest Warrant (FDEAW) provides a catalogue of 32 offences in which mutual trust goes further, meaning that extradition (or using the exact terminology – surrendering) may be refused only on limited grounds.[2] For other offences not provided in the catalogue, national criminal law provisions apply. More importantly, surrendering is a judicial procedure, unlike extradition which is political decision often made by Ministry of Justice, instead of a judge. The prerequisite for such cooperation is mutual trust and assumption that the same legal criteria apply, which is justified primarily because of the equivalence in providing fundamental rights, especially the right to a fair trial.

According the double criminality rule, the offences on the basis of which the EAW is issued must be criminalized in the issuing and the executing state. Consequently, if more charges are brought against an individual, and the double criminality is determined only for certain offences, then the further national prosecution can only continue for those charges. This is the so-called "special rule", according to which the person for extradition is subject to prosecution only for those crimes for which he/she was surrendered. Accordingly, the rule of double criminality may limit or reject the extradition.

The double criminality is a basic principle of extradition law and ensures that member-states are not forced to facilitate the prosecution of a crime they do not consider as criminal. Inspired by mutual trust among member-states, the EAW aimed at abolishing double criminality, but managed to do so partially. The FDEAW's catalogue of 32 offences explicitly emphasized that the double criminality is no longer needed. However, if a member-state so wishes, offences that are not listed in the catalogue remain to be subject of double criminality. This is questionable in terms of trust, as it obviously does not go beyond the 32 offences listed in the catalogue.

II Case Facts

In June 2017, Puigdemont as the President of Catalonia, announced that he would hold a referendum on independence of Catalonia on October 1, 2017. On 6 and 7 of September Puigdemont approved laws that allowed holding of a compulsory referendum with a simple majority and without minimum threshold, judicial transition and foundation of a republic, as well as a new

[1] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.07.2002.

[2] *Ibid*., Articles 3 and 4.

constitution of Catalonia which would enter into force if the referendum supports the independence. The next day, Spain's Constitutional Court abolished the laws, thus blocking the referendum. However, on October 1, 2017, the independence referendum was held despite the Constitutional Court's decision that it violated the Spanish Constitution. Despite cyber-attacks from Spanish Government, closure of polls and the use of force by Spanish police with 900 injured people, 43% of Catalonia citizens managed to vote and 92% in favour of the independence. The Catalan Parliament declared independence on October 27, thus invoking Article 155 of the Spanish Constitution and imposing a "Direct Rule" on Catalonia by the Senate and dissolution of the Government of Catalonia.[3] On October 30, 2017, charges of rebellion, sedition and misuse of public funds were raised against Puigdemont and other Government members.[4] During the referendum, Puigdemont was responsible for violent clashes, as well as injuries to police officers. The charges included a prison sentence of 30, 15 and 6 years. Puigdemont fled to Belgium on October 30, and on November 3, the EAW was issued for his arrest. On November 5, Puigdemont surrendered to the Belgium police, but after 10-hour hearing was released on bail. He was ordered not to leave Belgium without permission and to provide information about his accommodation.

1. Belgium Court's Decision

When the EAW for the first time was questioned in front of the Belgian Court, considering Spain's request, it was indicated that the Puigdemont's legal counsellor argued that fundamental rights of his client, including the right to a fair trial, would not be guaranteed in Spain. Further, it was expected that the Belgian Court would request a clarification from Spain's authorities regarding the offences on which the EAW is based (rebellion, sedition and misuse of public funds). The Belgium Court requested a confirmation that the offences of rebellion and sedition according Spanish legislation, were also offences provided in Belgian legislation. In this regard, the EAW allows the executing state (in this case Belgium) to refuse to execute the EAW under certain circumstances,

[3] The Spanish Constitution Passed by the Cortes Generales in Plenary Meetings of the Congress of Deputies and the Senate held on October 31, 1978 Ratified by the Spanish people in the referendum of December 6, 1978 Sanctioned by His Majesty the King before the Cortes on December 27, 1978, *https://www.boe.es/legislacion/documentos/ ConstitucionINGLES.pdf*, accessed on 10.01.2019.

[4] Spanish Criminal Code, Official State Gazette, No. 281/95, 24.11.1995; Title XXI: On Felonies Against Constitution, Chapter 1: Rebellion, Articles 472-484; Title XXII: Felonies Against Public Order, Chapter 1: Sedition, Articles 544-549; Title XIX: On Felonies Against Public Administration, Chapter V: On Corruption, Articles 419-427.

including, in respect of certain offences, where the EAW is based on act that does not constitute a criminal offence under the law of the executing state.

Therefore, the Belgium Court could refuse to execute the EAW or to accept to surrender Puigdemont under guarantees that he would not be tried for offences not recognized under Belgian legislation, including rebellion and sedition. This would have had a significant impact on Spanish prosecution, as the rebellion was a major offence for which prison sentence of up to 30 years was envisaged. On December 5, the Supreme Court of Spain withdraw the EAW against Puigdemont and other politicians, stating that the EAW is no longer valid for the alleged offences committed by a larger group of people.[5] However, the National Arrest Warrant (NAW) remained in force, meaning that Puigdemont is under risk to be arrested if returned to Spain.

2. Additional Case Facts

On March 22, 2018, Puigdemont travelled from Belgium to Finland, just for the next day the Spanish Supreme Court formally to accuse Puigdemont on charges of rebellion, sedition and corruption in form of misuse of public funds – caused costs of up to 1.6 million euros – and re-issued the EAW. Puigdemont continued to travel by vehicle from Finland back to Belgium, but was arrested by the German police immediately after crossing the Danish border on Sunday morning, March 25, in the Norther-German state of Schleswig-Holstein. However, Puigdemont was not arrested in Finland or Denmark while crossing, but in Germany, as it was suggested that the Spanish authorities "requested" the arrest to happen in Germany, due to legislation similarities. On Monday, March 26, the Court of Neumünster decided to detain Puigdemont in custody until the Court decide regarding the EAW.[6]

Within a deadline of 60 days according Article 17, paragraph 4 of the FDEAW for the execution of the EAW, the German Court was obliged to decide whether to execute the EAW, to which the Puigdemont has right to appeal, and then to surrender him to Spain or according Article 3 and 4 of the FDEAW to decide on one of the grounds for non-execution of the EAW and to be released. During this process, the German judge requested additional relevant information from Spanish authorities in order to help in making the decision.

---

[5] Poder Judicical Espana, *http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-juez-del-Tribunal-Supremo-Pablo-Llarena-rechaza-la-entrega-de-Carles-Puigdemont-solo-por-el-delito-de-malversacion*, accessed on 10.01.2019.

[6] "Statement Interior Minister Hans-Joachim Grote on the arrest of Carles Puigdemont", *https://www.schleswig-holstein.de/DE/Landesregierung/IV/Presse/PI/2018/180325_PI_Festnahme.html*, accessed on 12. 01. 2019.

On April 5, 2018, Puigdemont was released on bail, by Court's ruling that he could not be extradite for "rebellion" as the German legislation does not correspond with Spanish legislation on such a definition, necessary for the execution of the EAW, due to lack of double criminality,[7] that is, lack of consideration of analogue diversion of facts in relation to the then relevant criminal offence of "high treason" according Section 81 of German Criminal Code (GCC) of the constituent element of "force".[8] Regarding accusations of corruption, the Court requested additional information in order to closely examine the admissibility of extradition related to this offence.[9] According this decision, Puigdemont was instructed to report to the police once a week and not to leave Germany without prosecutor's permission. On July 12, 2018, the Higher Regional Court of Schleswig-Holstein (Schleswig-Holstein Court) ruled that he could be extradite to Spain only for misuse of public funds, but not for more serious charges of rebellion. Following this, on July 19, 2018, Spain again withdraw the EAW, making Puigdemont again free to travel and returned to Belgium.

III German Court's Decision and the Double Criminality

The Schleswig-Holstein Court is not alone in the refusal of the EAW for Puigdemont. Also, Belgium's judicial authorities, failed to meet Spain's request – partly due to formal reasons – and refused to extradite the Catalan politicians. In Germany, the provisional release of Puigdemont is positively accepted. On the one hand, Puigdemont, accused by Spanish judicial authorities, broadly presents himself as a freedom fighter, but, on the other hand, the Spain's Supreme Court, after initial reactions, criticized the ruling of the Schleswig-Holstein Court as inadequate to the problem of Catalonia's attempts to secede. Thus, the EAW is in powerful political context, unlike the European criminal law that appears to be quite fragile. The EAW works, e.g., in cases of car theft, but when comes to

[7] "The Oberlandesgericht for the State of Schleswig-Holstein issues extradition arrest warrant against Carles Puigdemont for embezzlement and stays the extradition arrest warrant's execution", *https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201803Puigdemontenglisch.html*, accessed on 12.01.2019.

[8] German Criminal Code, Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p. 3799, Section 81: High Treason against the Federation: (1) Whosoever undertakes, by force or through threat of force: 1. to undermine the continued existence of the Federal Republic of Germany; or 2. to change the constitutional order based on the Basic Law of the Federal Republic of Germany, shall be liable to imprisonment for life or for not less than ten years. (2) In less serious cases the penalty shall be imprisonment from one to ten years. *https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0833*, accessed on 15.01.2019.

[9] The Oberlandesgericht for the State of Schleswig-Holstein issues extradition arrest warrant, *Ibid*.

political crime of higher proportions, it does not work properly. The reactions of German and other judicial authorities to the extradition request by Spain, as a democratic constitutional state, reflects the crisis in mutual trust among EU member-states, that results in loss of common legal principles, especially in criminal law.

With such difficult issues, the Schleswig-Holstein Court examined the German legal situation according Section 79 of the Act on International Cooperation in Criminal Matters (AICCM).[10] Also, the issue is underlined by national law provisions. However, this EU's legal problem that goes beyond national law provisions could only be resolved in legally appropriate manner if the arguments put forward in Puigdemont's case, and especially the CJEU's case-law according FDEAW's mutual recognition principle and double criminality, are sufficiently elaborated. Finally, this may reveal the loss of EU's criminal law principles, but at the same time offering possibilities of creating such principles in its critical function. According our opinion, the Schleswig-Holstein Court had to refer the case to the CJEU in a preliminary ruling procedure.

1. The EAW *vis-à-vis* National Law Provisions

According national law, under Section 15, paragraph 1 of the AICCM, a person must be ordered to be detained upon receipt of an extradition request, unless it is not permitted under Section 15, paragraph 2, of the same Act.[11] In case of the EAW, special provisions of Section 79 of the Act provide validity. This especially

[10] Act on International Cooperation in Criminal Matters (AICCM) of 23 December 1982 (Federal Law Gazette I page 2071), as last amended by Article 1 of the Act of 21 July 2012, Bundesgesetzblatt I 2012, 1566, Section 79 - Duty to Grant Assistance; Preliminary Decision: (1) Admissible requests for extradition or transit by a member-state may only be denied as far as provided in this Part. The decision refusing assistance must contain reasons. (2) Prior to the decision of the Oberlandesgericht on admissibility the authority in charge of granting assistance shall decide whether it intends to raise objections under s. 83b. The decision not to raise objections must contain reasons. It is subject to review by the Oberlandesgericht in the procedure under s. 29; the parties shall be heard. When being notified under s. 41(4) the person sought shall be warned that in the case of simplified extradition a judicial review under the 3rd sentence above is not available. (3) If facts arising after a decision under subsection (2) 1st sentence above which are capable of giving rise to obstacles to admissibility do not lead to a refusal, the decision not to raise objections shall be subject to review in the procedure under s. 33. *http://www.gesetze-im-internet.de/englisch_irg/englisch_irg.pdf*, accessed on 15.01.2019.

[11] *Ibid*., Section 15 - Extradition Detention: (1) Upon receipt of an extradition request extradition detention of a person may be ordered 1. If there is a danger that he may avoid the extradition proceedings or the execution of the extradition; or 2. If based on ascertainable facts there is strong reason to believe that the person would obstruct the investigation of the truth in the foreign proceedings or in the extradition proceedings. (2) Subsection (1) above shall not apply if it appears *ab initio* that extradition will not be granted.

applies to the need of double criminality, which does not apply if the EAW relates to one of the offences listed in the FDEAW, as provided under Section 81, point 4 of the same Act.[12] This is not the case regarding the accusations of "rebellion".

Therefore, admissibility and granting of extradition presuppose double criminality under Spanish and German law. According Section 3 paragraph 1 of the AICCM this depends on conversion of facts. An object of hypothetical examination is an unlawful act in sense of criminal procedure.[13] The subject of investigation is whether the facts specified in the extradition request would be a matter of criminal penalty according GCC. For that purpose, the facts indicated by the requesting-state must be considered as such as happened on German territory.

Contrary to this background, the Schleswig-Holstein Court properly examines whether the facts under which the Spanish courts based the offence of rebellion would be a subject of criminal penalty on German territory under Section 81 of the GCC. For that purpose, the Schleswig-Holstein Court relied on national case-law ruled by the Federal Court of Justice with similar facts. In this case, violent clashes during demonstrations against additional runway at the Frankfurt Airport were subject of accusations for coercion by constitutional authorities.[14] For the Spanish Constitutional Court it is irritating to observe how an act of such political importance and declared as unconstitutional is minimized before the German court as a question of state's protection of criminal law. Also, comparing the case facts can determine the hypothetical examination of double criminality, as it establishes various grounds for interpretation of the facts: the subject of Federal Court's ruling was the interpretation of the violence concept and its definition regarding offences against freedoms – such as coercion –which is more restrictive. Consequently, the constituent element of the offence of violence in

[12] *Ibid*., Section 81 - Extradition for the Purpose of Prosecution and Enforcement, point 4: "double criminality shall not need to be established if the offence on which the request is based is under the law of the requesting-state punishable by a custodial sanction with a maximum term of no less than three years" and is listed in article 2, paragraph 2 of the FDEAW.

[13] *Ibid*., Section 3: Extradition for the Purpose of Prosecution and Enforcement, paragraph 1: Extradition shall not be granted unless the offence is an unlawful act under German law or unless *mutatis mutandis* the offence would also constitute an offence under German law.

[14] On demonstrations and use of force see: Backes Otto, Peter Reichenbach, "Freedom to Demonstrate and the Use of Force", in: Wilhelm Heitmeyer, John Hagan (eds.), *International Handbook of Violence Research*, Kluwer Academic 2003, pp 1079-1096; on Federal Court of Justice ruling see: *http://www.servat.unibe.ch/dfr/bs032165.html*, accessed on 15.01.2019.

sense of the offence of high treason does not satisfy every physical coercion related with coercive means.[15]

These *vis compulsive* demands – put in front in the context of high treason – appear to have been unnecessary for the Spanish criminal law. According the facts stated in the extradition request, it is enough to assume that the facts of the offence of rebellion for which the requested person is prosecuted, at least, accepted the violence committed against police officers and considered it probable. Therefore, the Schleswig-Holstein Court, also, underlines that Puigdemont must be held responsible for the "acts of violence committed on the day of the referendum".[16] As a result, there is no lack in characteristic of violence, but in its intensity which is actually needed. Finally, the Schleswig-Holstein Court makes the double criminality unsuccessful as, according the GCC, the more rigorous, more restrictive concept of violence that Spanish Criminal Code presumes for such violence of rebellion must be applied to high treason offence.

2. Issues Regarding European Law

It is possible that this inadmissibility of the extradition regarding rebellion according the exclusive criteria under the GCC could have been prevented either by the EU law or, regarding EAW's procedural context, to be supplemented under the EU law. Regarding the special nature of extradition provisions under the FDEAW and in case of a request from other EU member-state, it is of great importance to consider whether the traditional part of double criminality under international law – and under Section 3 of the AICCM – is, also, exceeded by EU law provisions and their interpretation by the CJEU in such a manner that the GCC is not the sole legal act for extradition or, at least, that such should be adapted to the EU law.

The AICCM gives priority to extradition and enforcement rules among EU member-states through traditional and bilateral agreement among sovereign states. This priority has the principle of legitimacy in mutual recognition of judicial decisions, seen as central in the EU's Area of Freedom, Security and Justice (AFSJ). This principle is supported by mutual trust among member-states,

[15] German Criminal Code, Section 105 – Blackmailing constitutional organs: (1) Whosoever, by force or threat of force, unlawfully coerces 1. a legislative body of the Federation or a member state or one of its committees; 2. the Federal Assembly or one of its committees; or 3. the government or the constitutional court of the Federation or of a member state not to exercise their functions or to exercise them in a particular manner shall be liable to imprisonment from one to ten years. (2) In less serious cases the penalty shall be imprisonment from six months to five years.

[16] *https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201803Puigdemontenglisch.html*, accessed on 15.01.2019.

especially in protection of fundamental rights, judicial independence and impartiality. In this context, the double criminality rule consider to be an exception of the mutual recognition principle – an exception that should be interpreted restrictively.[17]

Contrary to this, the CJEU interprets the double criminality criteria. It is questionable whether these criteria supports the Schleswig-Holstein Court interpretation or whether they could moreover require additional legal considerations or even to oppose to the Schleswig-Holstein Court interpretation. After all, this refers to the condition of analogue conversion of circumstances and the complete and comprehensive examination of constituent elements of violence under Section 81 of the GCC. Article 4, paragraph 2 of the FDAEW permits the possibility of examination the double criminality. Such examination most be carried out regardless of the facts and the determination of the offence.

According CJEU's case-law, the necessary and sufficient condition is that the acts giving rise to the ruling imposed in the EAW issuing-state also constitute an offence in the executing-state. It follows that the offences do not need to be identical in the two member-states concerned.[18] So, there does not have to be an exact match between the constituent elements of the offence, as defined in the law of the issuing-state and the executing-state, or between the name given to or the classification of the offence under respective national legal systems.[19] It is therefore safe that the facts of the case, as indicated by Spanish judiciary, correspond to the offence of rebellion in Spain with the offence of high treason in Germany. The relevant criteria is more correspondence among facts elements on which the offence is based – as it is reflected in the issuing-state's ruling – in definition of the offence under the legislation of the executing state. Accordingly, the Schleswig-Holstein Court's approach, which – and under the prevailing opinion of the AICCT – presupposes a procedural act that should be fully assessed by hypothetical examination in accordance with the provisions of GCC, seems to be supportive by recent CJEU case-law.

But this is only superficial: e.g. the CJEU requires a flexible approach from the competent authority of the executing state when assessing the condition of double criminality in order to align the extradition request as far as possible.[20] Such case-law suggests that the equivalence of factual characteristics and offences in the executing-state does not mean a fully comprehensively normative interpretation of factual characteristics and their possible conflictual dogmatic

[17] Case C-289/15, *Krajský súd v Prešove v. Jozef Grundza*, [2017] ECLI: EU: C: 2017:4, paragraph 46.

[18] *Ibid*., paragraph. 34.

[19] *Ibid*., paragraph 35.

[20] *Ibid*., paragraph 36.

interpretation, but provides a general agreement to be sufficient in relation to the constituted factual injustice. Therefore, the CJEU simply requires the facts of the case to be subject to a criminal penalty *per se* in the executing-state.[21] Implicitly, the CJEU deviates from criminal procedural dogma and considers the double criminality character as an exception of mutual recognition. Accordingly, only "relatively high level of abstraction" for relevant acts is recorded.[22] Further, "exact match between the taxonomy used to describe that criminal offence" is not needed.[23] Thus, the application of criminal code, e.g. a way of interpretation of the issuing-state, may be recognized in the executing-state even if its application and interpretation would lead to a different result in the executing-state.[24]

Regarding this determination of double criminality under EU law and the analogue conversion of case facts, the Schleswig-Holstein Court's approach and the AICCM may prove excessive in their requirements. Instead of complete examination of facts according GCC, it would only be important that the offences of rebellion and high treason are similar in their unfair content. The views of the Schleswig-Holstein Court that the prosecuted person had to take into account the violence during the referendum could constitute sufficient condition for the purposes of the EU law on double criminality. However, it would be irrelevant for the admissibility of extradition that the GCC has a more restrictive approach on the constituent element of violence regarding Spanish Criminal Code. Therefore, the broad interpretation of the element of violence by the issuing-state should have been recognized by the executing-state. Regarding the allegations of corruption in the form of misuse of public funds undertaken by the Spanish judiciary, the examination of double criminality has been rejected since it can be attributed to the catalogue to the offence of corruption according Article 2, paragraph 4 of the FDEAW. In determining whether the circumstances of the offence are sufficiently explained, under Section 83a, paragraph 1, point 5 of the AICCM, the only condition is that the issuing-state must reasonably indicate the requirements of the offence under Spanish legislation.[25] Hence, it may not be relevant whether there is a financial loss, as understood by the German

[21] *Ibid*., paragraph 38.

[22] Case C-289/15, *Krajský súd v Prešove v. Jozef Grundza*, Opinion of Advocate General Michal Bobek, [2016], ECLI: EU: C: 2016:622, paragraph 76.

[23] *Ibid*., paragraph 77.

[24] Case C-367/16, *Hof van beroep te Brussel v. Piotrowski*, [2018], ECLI: EU: C: 2018:27, paragraph 52.

[25] Section 83a - Extradition Documents, point 5 of paragraph 1: Extradition shall not be admissible unless the documentation mentioned in s. 10 or a European arrest warrant containing the following information have been transmitted: a description of the circumstances in which the offence was committed, including the time and place of its commission and the mode of participation by the person sought.

legislation, even if, under the Spanish legislation, the undertaking of financial obligations for the referendum would be punishable.

The Schleswig-Holstein Court found that double criminality was lacking as far as the rebellion, since it did not constitute an offence under GCC and therefore rejects the extradition as inadmissible at the beginning. This is in accordance with the generally accepted criteria of the AICCM, according which the analogue conversion of facts and full examination of the facts submitted by the issuing-state must be taken into account, as if the offence happened on German territory. The closest possible offence, high treason, also is not applicable by the Court, as the Puigdemont's actions are not accompanied by violence. Further, the Court found that the violation of public order is not relevant. Accordingly, the offence of high treason assumes a much more restrictive concept of violence compared to the offence of rebellion under Spanish Criminal Code. Therefore, under this ruling, Spain could prosecute Puigdemont only for misuse of public funds, thus significantly narrowing Spanish prosecutor's possibilities; instead of being charged for offence punishable by 30-year prison sentence, he could be prosecuted for the offence of corruption punishable by imprisonment of eight years.

Another rule of extradition that needs to be mentioned is that the extradition request must contain *prima facie* evidence. This request has also been abolished by the EAW, again inspired by the mutual trust. This is criticized for enabling politically motivated charges, as it deprives the executing-state's ability to assume whether the evidence against an individual holds true.

In this case, the Schleswig-Holstein Court went beyond the standardized form that constitutes the EAW and examined the available evidence to determine whether violence was used by Puigdemont. This was indeed necessary to determine whether the double criminality rule could be satisfied. Still, this goes against the meaning of the EAW. The strict legal interpretation of the double criminality could be technically true, but it seems to be contrary to the general rule of the commitment to cooperate. At the end, the double criminality condition is based less on protection of fundamental rights, rather than on deeply rooted concept of national sovereignty.

This is particularly difficult, since it can be imagine that the assessment of available evidence can lead to a different conclusion by Spanish judges. It is possible to find very well that the Puigdemont's activities caused violent behaviour or, as argued by German prosecutors "must be held responsible for the acts of violence committed on the day of the referendum".[26]

[26] *https://www.schleswig-holstein.de/DE/Justiz/OLG/Presse/PI/201803Puigdemontenglisch.html*, accessed on 15.01.2019.

Still, our consideration is that the double criminality criteria regarding this case must have been and should have been interpreted according EU law, at least in the context of the extradition request based on the EAW. As noted above, on the one side, under the EU law, the analogue conversion of facts aimed at the procedural concept of the offence and the subsequent examination by the CJEU is in principle supported. From the other side, it follows that the EU law only requires the elements of the offence to be identical in its content and not in their specific application.

IV Withdrawal of the EAW

The Schleswig-Holstein Court ruled that Puigdemont could be extradite only for the offence of misuse of public funds, refusing the extradition for rebellion, meaning he could not face trail in Spain on that ground. For that reason, the Spanish Supreme Court on July 19, 2018 withdraw the EAW for extradition of Puigdemont.[27] The decision means that Puigdemont, who today resides in Belgium, no longer faces a treat of extradition. But, the NAW remains in force, meaning that he would be arrested if returned to Spain.

The Supreme Court stressed that there was a lack of commitment by the German Court over the events that violated the Spain's constitution.[28] It considered that the German Court brought the ruling without adhering to the EAW provisions or the CJEU' case-law or the EAW Handbook issued by the European Commission.[29] The reasoning of the Spanish Supreme Court was that the German Court should have restricted itself in determining whether the facts described by the Spanish legal system are predicted in the GCC and if suspicious events were undertaken in Germany, than a criminal investigation similar to that in Spain would have been undertaken.

In this sense, the German Court ruling is not in line with the FDEAW and its rejection regarding some basic facts of rebellion and sedition (limiting the Spanish legislation in prosecution only of misuse of public funds), based on analysis in which legal authorities of the executing-state undertakes no abstract consideration of the offence classification, but address the final judgment on summing up the facts of the offence.

---

27 *http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/Noticias-Judiciales/El-juez-del-Tribunal-Supremo-Pablo-Llarena-rechaza-la-entrega-de-Carles-Puigdemont-solo-por-el-delito-de-malversacion*, accessed on 15.01.2019.

28 *Ibid*.

29 Commission Notice – Handbook on how to issue and execute a European arrest warrant (2017/C 335/01), OJ L C335/1, 06.10.2017.

The Spanish Supreme Court was of the opinion that in matters of doubt in EU law interpretation, in this case the EAW, on an issue which is not ruled before a court whose decision could not be challenged under national law, the German Court should refer the matter to the CJEU in preliminary ruling procedure. Doing so, it would have a clear interpretation of the paw, guaranteeing uniform use of the EU law.

Preliminary ruling was necessary as there were suspicions regarding interpretation that had to be brought before the Schleswig-Holstein Court, because the German prosecutors requested extradition on all grounds, not only for the misuse of public funds. Also, according the Spanish Supreme Court, there was no direct EU case-law for the double criminality concept in the FDEAW and that the indirect CJEU's case-law was in contradiction with the position of the German Court.

V Conclusion

The net outcome is a situation in which there are no clear winners. The German Court carefully manuevered in this highly political prosecution case and come up with a compromise that satisfies or dissatisfies to some extent all parties: extradition yes, but not for the most serious and controversial ground. Spain could not prosecute Puigdemont on charges of rebellion and the already fragile opinion on mutual trust, today is under a bigger pressure.

The case presents a test for EU's judicial model based on mutual trust, but triggered crisis in EU's criminal law. The German Court secured that the high level of trust that undermines the European cooperation was not jeopardized with the events in Spain and remained high as always. But, considering that this is the most striking case in the recent years it sends a signal that there is still freedom for judicial authorities to evaluate extradition requests. The German Court explicitly rejected the Puigdemont's claim that he would not receive a fair trial and that is under risk of political prosecution in Spain: it was an excessive accusation against Spain as an EU member-state and the common judicial area. It also, expressed unconditional trust that Spanish judicial authorities shall respect the national and international requirements.

By accepting the Puigdemont's extradition, although only for the offence of corruption, the Schleswig-Holstein Court materially supported the mutual trust and basically postpones the Spanish demands. At the same time, by refusing the prosecution on rebellion and sedition, the German Court entered the Spanish legal system and significantly limited the Spanish prosecutors. This raises question whether the Court only superficially draws attention on mutual trust or significantly gives a sufficient degree of respect to Spanish demands and whether the case merely emphasizes that there are limitations in mutual trust.

Fundamental interest of Spain was to prosecute Puigdemont for offence of rebellion, which under the German Court's ruling and the withdrawal of the EAW is no longer possible.

Therefore, as pointed several times, it is our opinion that the Schleswig-Holstein Court or the Spanish Supreme Court had to refer to the CJEU for preliminary ruling procedure under Article 267 of the Treaty on Functioning of the European Union in order to determine whether the double criminality rule in the context of conversion of facts of the offence in the executing-state, also includes concrete examination of criminal law's interpretation by the executing-state if this proves more restrictive than the interpretation of the issuing-state. It is also important to feel that the CJEU is present in such high-profile and politically motivated cases and may be able to establish case-law in the future for member-states to refer cases to a preliminary ruling procedure when there are doubts shortcomings in the mutual trust framework. This is initially unusual technique that breaks through German law provisions. The outcome may also be sensitive, especially as it becomes clear that the EU's criminal law system does not follow common standards. Because of this controversial situations, we believe that the European Court on Human Rights may resolve this case once and for all.

Ivica Josifovic, Phd[*]
Igor Kambovski, Phd[**]

The Puigdemont Case: The European Arrest Warrant and Mutual Trust at Risks

Summary

The Puigdemont case clearly shows that mutual trust between EU member-states is in crisis. The decision of the Schleswig-Holstein Court not to refer the case to the CJEU for a preliminary ruling procedure on issues related to the EU law and the execution of the EAW in the area of double criminality, raise serious questions regarding mutual trust and the future role of member-states in the construction of criminal law within the EU. The German Court decided to act on its own regarding Puigdemont's extradition, instead of putting the EU judiciary system in play, adopting critical decision in which there are no winners. The case

[*] Associate Professor, Faculty of Law University of Goce Delcev-Stip; ivica.josifovik@ugd.edu.mk.

[**] Associate Professor, Faculty of Law University of Goce Delcev-Stip; igor.kambovski@ugd.edu.mk.

contributed to the loss of EAW's meaning and to become an EU's legal instrument that is used only for minor offences in which mutual trust is high, unlike the Puigdemont's case where such trust was disrupted and caused uncertainties due to the compromise for which no side could be satisfied: EU's criminal law must not succumb to the satisfaction of any of the parties. The paper clearly emphasize that the EU law, governed by principles of supremacy and direct use, should be respected, regardless of the case, what political weight and what kind of offence, if true mutual trust and cooperation is desired among EU member-states.

Keywords: mutual trust, Puigdemont, Court of Justice, European Arrest Warrant.