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Court of Justice of the European Union

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Advocate General's Opinion in Case C-168/21
Procureur général près la cour d'appel d'Angers

Advocate General Rantos: the executing judicial authority may not refuse to execute a European arrest warrant on the ground that some of the various acts punishable as a single offence in the issuing Member State are not punishable under the criminal law of the executing Member State

Moreover, the condition of double incrimination in the context of a European arrest warrant is satisfied where the interest protected by the law of the executing Member State is similar to that taken into consideration in the issuing Member State

KL was sentenced in 2009 inter alia to ten years' imprisonment by the Italian courts for seven acts giving rise in Italian law to the single offence of 'devastation and looting', committed in the context of the G8 summit in Geneva (Italy) in 2001. Following his arrest in France, he did not consent to his surrender pursuant to the European arrest warrant ('the EAW') issued by the Italian judicial authorities. In 2020, the Indictment Division of the Court of Appeal, Angers (France) refused to surrender KL on the ground that, among the seven acts forming the offence as held by the Italian courts, two acts were not offences under French criminal law.

The Cour de cassation (France) asks whether the breach of the peace that the Court of Appeal, Genoa and the Court of Cassation (Italy) attributed to KL as an essential element of the offence of 'devastation and looting' is relevant in determining whether the condition of double criminality is met as provided for under EU law. It notes, first, that the elements constituting that offence are different in the two Member States concerned and, secondly, that some of the acts covered by that offence are not subject to a criminal penalty in the executing Member State. The Court of Justice is thus called upon to determine the scope of the condition of double criminality, within the meaning of the framework decision concerned.¹

In his Opinion delivered today, Advocate General Rantos proposes that the Court answers the questions referred to the effect that, in the circumstances described by the referring court, the provisions of the framework decision **require the EAW to be executed**.

He observes, first of all, that EU law permits the executing Member State to make the execution of the sentence conditional on the **double criminality test** being met. That test is an exception to the general rule of recognition of judgments and enforcement of sentences, the scope of the grounds for refusing to recognise a judgment or enforce a sentence, on the basis of lack of double criminality, must be interpreted strictly in order to limit cases of non-recognition and non-enforcement.

As regards, more specifically, the assessment of double criminality, he notes that the necessary and sufficient condition for the purpose of assessing double criminality resides in the fact that the acts giving rise to the sentence imposed in the issuing Member State also constitute an offence in the executing Member State, and that it follows that **the offences do not need to be identical in the two Member States concerned**.

¹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1).

The Advocate General adds, in that regard, that the condition of double criminality must be considered to be **met** where the **factual elements underlying the offence** would **also be subject to a criminal sanction** in the territory of the executing Member State if they were present in that State. He notes that, according to the Court's case-law, there does not have to be an exact match **between the constituent elements of the offence**, as defined in the law of the issuing Member State and the executing Member State, **or between the name given to or the classification of the offence under the national law of the respective States**. Thus, the competent authority of the executing Member State must ascertain, whether, in the event that the offence at issue were committed in the territory of that Member State, it would be found that a **similar interest**, protected under the national law of that State, **had been infringed**. He notes that, in the present case, the condition of double criminality is satisfied since the acts covered by the offence classified as 'devastation and looting' are punishable under French criminal law, for which the interest at stake is the protection of the owners of the property concerned. Consequently, the **interest** protected by the law of the executing Member State is **similar** to that taken into consideration in the issuing Member State.

Moreover, according to the Advocate General, having regard to the wording, the context and the objective of the framework decision, that provision does not require that all of the acts constituting a single offence in respect of which an EAW has been issued constitute an offence in the executing Member State. Accordingly, the condition of double criminality is satisfied even where only some of the acts constituting a single offence are punishable under the criminal law of the executing Member State.

The Advocate General notes, as regards the proportionality of the sentence imposed, that the executing judicial authority may make the execution of an EAW subject solely to the conditions set out under EU law, the possible disproportionality of the sentence is not among the grounds for non-execution laid down by EU law. Indeed, the Court has recognised that limitations may be placed on the principles of mutual recognition and mutual trust between Member States 'in exceptional circumstances'. However, according to the Advocate General, the mere fact that not all of the acts prosecuted as a single offence in the issuing Member State constitute a criminal offence in the executing Member State is not a sufficient basis for establishing a new 'exceptional circumstance' where the fundamental rights of the requested person **have been respected in the issuing Member State**.

Ultimately, the Advocate General takes the view that the executing judicial authority **may not refuse to execute an EAW** issued with a view to execution of a sentence in circumstances where that sentence relates to the commission, by the requested person, of multiple acts, punished as a single offence in the issuing Member State, when some of those acts are not punishable under the criminal law of the executing Member State.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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