



13 December 2017

The Puigdemont case exposes challenges in the European Arrest Warrant

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Spain's withdrawal of the EAWs for Puigdemont and his ministers is narrowly linked to the uncertain outcome that would have followed their examination by the Belgian authorities.

The Puigdemont case in Belgium, involving the ousted Catalan leader and four of his former cabinet members, has focused the attention of European and other media on the EU Framework Decision of 13 June 2002 on the European Arrest Warrant (EAW), some 15 years after it was adopted. The case has put the cooperation mechanism, which is based on mutual trust between member states and their respective authorities, to a severe test. Several weeks after issuing the arrest warrants, Supreme Court Judge Pablo Llarena withdrew them on December 5th, citing, inter alia, the stated intention of the concerned individuals to return to Spain in order to campaign in the new round of elections that have recently been called. The withdrawal should logically bring an end to this extended saga. When trying to understand why the Spanish authorities withdrew the decision, one should pay close attention to the uncertain outcome that would have resulted from the examination by the Belgian executing judicial authorities of the concerned EAWs.

As with the other mutual recognition instruments, the Framework Decision does not entail automatic recognition and execution, but it has led to a number of major changes compared to traditional extradition practices. Three in particular are worth recalling: an acceleration in the procedure thanks to binding deadlines being set; the judicialisation of the procedure and reduced grounds allowing the competent authorities to refuse the surrender of the individuals concerned.

The 2002 Framework Decision envisages binding deadlines for the adoption of the final decision to execute the European Arrest Warrant (maximum 60 days after arrest with the possibility of an extension of an additional 30 days in exceptional circumstances) and for the effective surrender itself (a maximum of 10 days after the final decision on the execution of the European Arrest Warrant with possible extension).

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These deadlines have been correctly transposed into Belgium law. In broad outline, the first instance decision is to be taken by the *Chambre du Conseil* within 15 days of the arrest; within 24 hours of this decision or its notification, an appeal can be introduced to the *Chambre des mises en accusation*, which has, in turn, 15 days to express its position; within 24 hours of this decision or its notification, an appeal can be introduced before the *Cour de Cassation*. The latter then has 15 days to confirm the decision or to reject it and send it to another *Chambre des mises en accusation*, which itself then has 15 days to take a decision.

In the case at hand, the initial 15-day deadline has not been respected by the *Chambre du Conseil* (a decision was expected to be taken on the 14th of December), but the *juge d'instruction* had decided not to put Puigdemont and his colleagues in detention, which makes the judicial authorities often less "attentive" with regard to deadlines.

The judicialisation of and, as a consequence, the depoliticisation of the extradition procedure lay at the heart of the 2002 Framework Decision. This aspect absolutely must be pointed out given the extreme political sensitivity of the case and the statements of numerous politicians (including Belgians) in the media. The procedure must take place between the issuing Spanish judicial and executing Belgian judicial authorities. The traditional ground for refusing extradition based on the political nature of an offence has been abolished.

The other grounds for refusal have been reduced. Among those maintained in the Belgian law of transposition of 19 December 2002, two in particular merit attention.

The first is based on the requirement of double criminality, i.e. that the offence for which the surrender is requested is criminalised in the law of both the issuing and the executing Member State). This was abolished for 32 types of behaviour, which do not include two of the charges filed by the Spanish authorities: sedition and rebellion. For these offences, a dual criminality test must be carried out. But these are defined in different ways under Belgian and Spanish law, and from thence emerges the issue of the impact of differences in material criminal law on mutual trust.

One of the questions raised by this situation is to establish whether the Belgian legislator has complied with EU law since it has transformed the optional ground for refusal of the Framework Decision into an obligatory ground for refusal. By doing so, it has removed the margin of manoeuvre that the executing authorities could benefit from in deciding on the execution or non-execution of the EAW based on the absence of double criminality.

An examination of the Court of Justice ruling of 29 June 2017, in case C-579/15, *Daniel Adam Poplawski I*, leads one to say that such a transformation of an optional ground for refusal into a binding ground is contrary to applicable EU law. If the principle of primacy of this law over national law is applied to the Framework Decision of 2002 adopted as part of the old third pillar, the executing authority should on this point not apply Belgian law and give primacy to the EU text. The application of this principle to the Framework Decision results from the decision of the CJEU in its well-known *Melloni* judgment of 26 February 2013 (C-399/11). In a way, the CJEU is being asked to confirm this position in the pending case C-573/17, *Daniel Adam Poplawski II*.

In any event, the risk that the Belgian executing authority could have reduced the number of crimes for which Spain could try the concerned individuals has been one of the main elements taken into consideration by the Spanish judge.

The second ground for refusal that could have been marshalled is based on fundamental rights because, according to Belgian law, the execution of the warrant must be refused if there are serious grounds to believe that it would have the effect of undermining the fundamental rights of the person concerned. In the *Aryanosi and Caldararu* cases, the Court of Justice took a position on the extent of control to be exercised by the executing authority (ruling of 5 April 2016, case C-404/15 and C-659/15 PPU).

As in its 2/13 Opinion (18 December 2014), the Court underlined the importance of mutual trust and the presumption of respect for fundamental rights in the Union that can only be overturned in exceptional circumstances and it detailed the test to be carried out by the executing authority. The Court insisted that a dialogue be established with the issuing authority to obtain guarantees regarding the respect for fundamental rights.

By comparison with others, Belgian authorities are known for the high degree of trust granted to their European counterparts. The Puigdemont case could have revealed the level of trust that they have in the Spanish system. It could also have allowed a determination of whether the lessons from the *Aryanosi and Caldararu* cases, which concerned detention conditions in Hungary and Romania and the ban on torture, inhuman and degrading treatment, can be extended to the right to a fair trial.

The decision to withdraw the EAWs does not deprive the Spanish judicial authorities of the possibility to send new cooperation requests to their Belgium counterparts. But, at least for the time being, Belgium's judicial authorities will not have to take a decision about the execution of the European Arrest Warrants in this sensitive case. As a result, however, they will also lose the possibility of establishing dialogue with the Court of Justice and asking for a preliminary ruling on numerous questions of law that were raised.