Three Case Examples on the Application of the Principles in our ECBA Statement on mutual recognition of extradition decisions[1]

The ECBA launched a Statement on mutual recognition of extradition decisions in the EU, as individuals having successfully defended themselves against extradition in one Member State nevertheless face potential extradition in all remaining countries and are therefore deprived of their right to freedom of movement within the EU.

Across Europe, persons who have been successful in challenging INTERPOL red notices, extradition requests or EAW proceedings, face the risk of re-arrest and extradition or surrender, particularly when such persons cross borders. This is the case even where a successful challenge has come about because of the risk of a violation of human rights or political persecution that applies equally throughout Europe. They are thus de facto deprived of their right to freedom of movement and effective protection of their human rights, and lack remedies to avoid being re-arrested in all remaining EU and Council of Europe countries.

The ECBA proposes that the Member States of the EU should to give effect to the principles of mutual trust and mutual recognition, the right to liberty, and right to freedom of movement within the EU by agreeing:

- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the court has found the request for extradition to violate the principle of *ne bis in idem* or to be disproportionate;
- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the court has found a risk of a violation of fundamental rights, as long as it has not been established that the requesting state has taken steps to remediate this risk;
- To the creation of an independent, harmonised mechanism at the EU level in order to regulate the issuance and subsistence of alerts in the SIS (and the execution and continued effects of an INTERPOL alert within the EU) and to provide effective procedural safeguards on national and European-level with regard to the access and effective remedies against alerts.

We also encourage Members States of the Council of Europe to reflect on our recommendations and consider the possibility of recognizing the binding effect of the above-mentioned decisions by judicial authorities of any Council of Europe Member State as a matter of priority.

Read the full statement here."

We encourage all ECBA Members do disseminate this statement, and also to use it in their cases and get back to us letting us know about the result!

If you are interested in these matters, do join the ECBA Extradition Group by e-mailing secretariat@ecba.org

[1] https://www.ecba.org/content/index.php/124-featured/852-ecba-statement-on-mutual-recognition-of-extradition-decisions-june-2023#:~:text=The%20ECBA%20launched%20a%20Statement,right%20to%20freedom%20of%20movement

Case #1: Refusal of extradition by Spain to Angola of third-state national resident in the EU, on the basis of EU-wide fundamental rights to effective judicial protection and to a fair trial, in connection with the fundamental rights to personal liberty and freedom of movement – Binding and enforceable in Portugal

Spanish Constitutional Court's decision of 12 July 2021, handed down in the constitutional appeal 5275-2020.

Offences: corruption

Angolan citizen arrested in Spain on the basis of AN red notice. Extradition request presented to ES. In Angola the pre-trial arrest order and the red notice belong to the competence of the GA's office and there is no intervention by a judge or court. The GA's office may receive direct orders from the President.

Refused extradition to a third country - Angola - on the grounds of violation of the right to effective judicial protection and to a fair trial, in connection with the fundamental rights to personal liberty and freedom of movement. In fact, it was an application of the case law of the CJEU on the concept of "independent judicial authority" in EAW cases to an extradition case.

Person lives in Portugal, is not a EU citizen (but was wife and underage children who are). Lodged an application to have the Spanish decision given *exequatur* and thus recognized and enforced in PT in order to prevent an arrest on the basis of the same red notice underlying the extradition case in Spain.

Refused by the Coimbra Court of Appeal - grounds:

- the procedure only applies to criminal convictions and the decision under review is not a criminal conviction;

- giving effect to this decision in PT would violate PT sovereignty and international public law namely the obligations of PT towards Angola under the CPLP Extradition Convention (which is not applicable in Spain)

Portuguese Supreme Court Decision of 14.07.2022, case no. 157/21.7YRCBR.S1: reversed the decision.

Available here:

http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/1ce2a531b118d8b080258893003b6e9d?OpenDocument

Grounds (informal translation):

1) not a criminal conviction:

- "We believe, however, as the appellant argues, that such an understanding, based on the literalness of those rules, seems disproportionately limiting, not taking into consideration a systemic, teleological and functional interpretation

of the rules and institute to which they belong, in the normative unity of the system of international judicial cooperation in criminal matters to which they relate."

- "In the present case we are not dealing with a foreign judgment, but with a **community judgment**"

- "in view of the existence of the **principle of mutual recognition** of Community judgments - which is based on the idea of mutual trust among the Member States of the European Union - **it means that a judicial decision taken by the judicial authority of one Member State under its own law is directly enforceable by the judicial authority of another Member State**..

- "Now, **if the decision is covered by the principle of mutual recognition, it does not make sense to argue that only conviction judgments have the virtuality of being subject to review and confirmation**."

- "What makes sense is to use this procedure, accepting the existence of the principle of mutual recognition."

- "Although, in criminal matters, the recognition of judicial decisions generally involves the recognition of decisions that limit individual rights, and typically operates on a "bilateral" basis, between the issuing State and the executing State, being subject to grounds for refusal of execution linked to the idiosyncrasies of the executing State's domestic law, **we do not disagree with the appellant when he points out that at its origin, the principle has precisely the opposite idea, that of expanding the "*protection of freedoms against state power*", specifically of the freedoms established by EU law itself and which cannot be restricted by the domestic law of the MS, not being subject to such idiosyncrasies or variations**. Thus, **it may be said that whenever we are faced with a decision of a MS that, in application of EU law rules whose content is autonomous and must be applied uniformly in all Member States, this decision, under the principle of mutual recognition, is worthy of recognition in the other MS, without this constituting any violation of the sovereignty of the MS, since we are in the scope of the sovereign powers whose exercise was transferred to the Union, by a sovereign act of the MS."**

- "**However, recognition in matters of criminal decisions requires, as a rule, a decision of a constitutive nature by the recognizing State, so that the judicial decision in question must be susceptible of mutual recognition (and recognition through the review and confirmation process),** as will be the case of a decision applying a rule of EU law that has the purpose of protecting fundamental rights and freedoms and has autonomous content and is uniformly applicable in all Member States. **In this sense, a decision of the Spanish Constitutional Court in extradition proceedings must be considered a judicial decision in criminal matters which, as such, is subject to the principle of mutual recognitio**n"

- "As the CJEU decided in WS (mentioned by the appellant in his grounds of appeal), precisely in a case in which it was questioned what the effect of the existence of a right enshrined in EU law, and in particular Article 54 of the Convention implementing the Schengen Agreement (CISA) and Article 50 of the Charter of Fundamental Rights of the European Union (CFREU), **once a right is recognized by a court in a MS, the courts of the other MS will have to recognize it, according to the internal procedural mechanisms available, with the decision in question establishing a general principle regarding the binding nature for the other MS of a court decision of a MS recognizing a right or freedom established in EU law, in terms that make it illegal to provisionally detain with a view to extradition on the basis of a *red notice* issued by a third State**."

- "This **principle extends to other judicial decisions handed down in EU MS and having the same content, as long as it is an affirmation of a harmonized established right (as opposed, for example, to strictly national, non-harmonized grounds for refusal, such as age immunity or statute-barred prosecution)."** **→ this is what we sustain in our statement:** https://ecba.org/extdocserv/publ/ECBA_STATEMENT_Mutualrecognitionextraditiondecisions_21June2022.pdf

- "This is precisely the case of the decision which review is sought, which refused the applicant's extradition to a third State - Angola - on the grounds of violation of **the right to effective judicial protection and to a fair trial, in connection with the fundamental rights to personal freedom and freedom of movement**, in the appeal originating in the extradition proceedings brought against the applicant there, following his arrest in Marbella pursuant to the arrest warrant issued by the Angolan authorities, which in turn gave rise to the publication of a *red notice* (no. [XXXXXX]), which remains in force, so there is a real and effective risk that the applicant will be arrested in Portugal based on the same facts already considered by the Spanish courts, and without any prior judicial control, under the terms of the provisions of Article 39 of Law 144/99, of 31.08, and Article 21 of the Convention on Extradition between the Member States of the Community of Portuguese-Speaking Countries, in force between Portugal and Angola."

- "And the Judgment of the Spanish Constitutional Court 147/2020, of October 19, analyzing whether the extradition request complies with the canons of the fair trial and, specifically, whether the conditions of objectivity and impartiality of the authority whose decision is at the origin of the international cooperation procedure are verified, as conditions for the legality of restrictions on the rights to freedom and free movement within the space of an EU MS, and to define the normative *standard* for the decision, resorted to CJEU case law on the subject-matter"

- "And, it was precisely the lack of compliance with these fundamental rights established in EU law (and as counterparts in the Spanish Constitution) that led to the decision to refuse extradition by the decision which review is sought[3]"

- "**It follows from the above that the decision refused extradition on a pan-European basis, i.e. based on the rights enshrined in the Spanish Constitution, which are counterparts of the rights contained in the CFREU and, in this sense, declared EU law applicable to the case, a law that necessarily applies uniformly throughout the EU, as it is not subject to the idiosyncrasies of domestic law**."

- "Therefore, the decision which review is sought is susceptible to be reviewed and confirmed in Portugal, even though it is not a criminal conviction judgment"

2) violation of sovereignty / international law obligations:

- "contrary to what the appealed decision states, the granting of this procedural remedy does not in any way imply a violation of Portuguese sovereignty, or of any principle of international public order of the Portuguese State, but **rather guarantees, as mentioned above, compliance with the obligations under which the sovereign Portuguese State has entered into with its European partners**.

- "Paragraph 4 of that constitutional precept, introduced by Constitutional Law No. 1/2004 of 24-07 (Sixth Constitutional Review) states that "*The provisions of the treaties governing the European Union and the rules issued by its institutions in the exercise of their respective powers shall apply in the internal order, under the terms defined by Union law, with respect for the fundamental principles of the democratic rule of law.* "

- "Thus, this constitutional norm reflects the principle of the **primacy of community law over national law, as a structuring principle of the community order itself, as has been sustained by the Court of Justice of the European Union**.

- "One of the dimensions of this primacy consists precisely in "*setting aside pre-existing rules of domestic ordinary law and rendering invalid, or at least ineffective and inapplicable, subsequent rules which conflict with it. In the event of conflict, national courts must consider previous rules that are incompatible with the rules of EU law to be inapplicable and must disapply subsequent rules on the grounds of violation of the rule of primacy*"[4] , so the understanding postulated in the contested decision that a Convention established with a third country - in this case, the Convention on Extradition between the Member States of the Community of Portuguese-Speaking Countries - would have primacy over EU law cannot proceed."

- "Moreover, as the appellant rightly points out, **there is also no conflict with other obligations of international law that could bind the Portuguese State, since the constitutional law of the Union - such as the right to effective judicial protection and the right to a fair trial arising from Articles 19 and 47 of the EU Treaty and the CFREU - in conjunction with the right to liberty arising from Article 6 of the CFREU also take precedence over international obligations that conflict with them. In this sense, cfr. the Judgment of the CJEU in the Kadi1 case[5]** (cited in the grounds of appeal)"

- "*In casu,* as the applicant is a national of a third state, residing in Portugal since 2018, being the holder of a Residence Permit that allows the exercise of professional activity, also having economic activity here (with the ownership of real estate and shares in a commercial company), and the respective household consists, among the most, of two underage children and dependents with Portuguese citizenship and, as such, citizens of the Union, and the exercise by him of the right of residence and movement within the EU falls under Articles 79 and 80 of the TFEU, and various Directives and other secondary legislation, as well as under the scope of Articles 18 and 21 of the TFEU, by virtue of the citizenship of their dependent minor children, EU law, including the CFREU, is fully applicable"

- "This being the case, the other requirements for review and confirmation are met (double criminality, in this case, being a requirement that can only be assessed by referring to the facts underlying the extradition request that was refused by the Spanish courts; or even understood as inapplicable, since it is not a request for review and confirmation of criminal judgment in the strict sense, so that only the requirements for review and confirmation of sentence provided for in the CCivP would apply)."

- "In conclusion, to argue that it is impossible to review and confirm a judicial decision on international judicial cooperation handed down in another MS based on the primacy of an extradition treaty with a third state is tantamount to denying the primacy that EU law has over domestic law, under the terms of the Treaties and article 8(4) of the Portuguese Constitution."

- "This primacy does not remove anything from the sovereignty of the Portuguese State, quite the contrary, since it was by sovereign decision that Portugal chose to transfer to the Union the principle of mutual recognition in matters of judicial decisions that involve the application of EU law.

Case #2: Refusal of extradition by Slovenia to the US of a third-state national resident in the EU, on the basis of ne bis in idem due to final decision in Slovenia - Does it bind the German Courts?

Interpretation of Art. 54 CISA and Art. 50 CFR - extradition to third countries (here: USA) - extradition of a non-EU citizen (third country national) against whom a final judgment has been passed by another Member State of the European Union for the same offences to which the extradition request relates - obligations from bilateral extradition treaty between the requested EU Member State and the third country - follow-up to the CJEU judgment of 12 May 2021 in Case C-505/19 (WS v Bundesrepublik Deutschland).

Offences: criminal organization and fraud using computer means.

Serbian citizen resident in Slovenia arrested in Germany on the basis of US red notice. Extradition request presented to DE.

Slovenia had tried him for the same facts and convicted him to a sentence of 1y3m prison substituted by community work, already served. Also, in 2020 Slovenian courts refused extradition on the basis of same indictment since they found ne bis in idem applied.

Arguments:

1) refusal of extradition in DE would violate DE international public law obligations namely the obligations of DE towards US under the Bilateral Extradition Convention (which foresees ne bis in idem only for decisions in the requested state and not elsewhere; no IPL principle of jus cogens in respect of decision of third states)

2) but could the refusal be imposed by Articles 50 CFREU and Art. 54 CISA?

3) problem: on the contrary of the WS case, it is not a EU citizen. Further, the wording of WS only refers to the admissibility of the wanted notice and the provisional arrest but not explicitly to extradition.

Request for a preliminary ruling:
https://curia.europa.eu/juris/showPdf.jsf?text=&docid=263422&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1584472

AG Opinion:

https://curia.europa.eu/juris/document/document.jsf?text=&docid=267146&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1584472

"78. In the light of the foregoing considerations, I propose that the Court answer the question referred for a preliminary ruling by the Oberlandesgericht München (Higher Regional Court, Munich, Germany) as follows:

Article 54 of the Convention implementing the Schengen Agreement […] as amended by Regulation (EU) No 610/2013 […], **read in conjunction with Article 50 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the extradition of a person, whether or not he or she is a citizen of the European Union within the meaning of Article 20 TFEU, by the authorities of a Member State of the European Union to a third State, where final judgment has been passed against that person in another Member State for the same acts as those to which the extradition request made by that third State relates and that judgment has been enforced, even if the decision to refuse extradition would be possible only at the cost of breaching a bilateral extradition treaty with that third State**."

Case #3: Refusal of surrender based on an EAW by Poland to France on the basis of case pending for the same facts (Polish criminal case ongoing for the same facts as case in France); decision to refuse extradition by Polish court on the grounds of that pending case does not preclude surrender by German Courts.

OLG Braunschweig, Order of 16.09.2022 - 1 AR (Ausl.) 17/22

"The criminal proceedings conducted in Poland and the decision not to extradite the suspect based on them do not preclude the decision" [to surrender the person under an EAW]

Offences: burglary.

Although DE could also refuse extradition due to a pending criminal case for the same facts, this is only valid if the case is ongoing in DE.

Does this make sense at all?

1) This seems like one of those cases where one should apply a "Petruhhin logic": the concept of territory should be interpreted as "EU-Territory" and the person should not be surrendered. However, Petruhhin is based on a distinction in the proportionality of restriction of the right to reside in the EU in the scope of the alternative of extradition to a State outside the EU, or remaining within the EU for being prosecuted there. So, it would be applicable with a third MS.

2) This would mean though that we would only have a "partially" pan-European ground of refusal, applicable in those EU MS that refuse extradition due to pending proceedings in their MS. In this case, our principles would mean that such a decision to refuse surrender under an EAW or extradition agreement should be recognized and enforced in other MS.

3) Of course since this is a case between 3 EU countries, it shows a weakness of the EU legal system: the lack of a mechanism to avoid the multiplication of cases for the same facts against the same person throughout the EU, namely clear rules on the competent MS, and a fair procedure in order to decide which jurisdiction should prosecute. See the ECBA Handbook on the EAW for Defence Lawyers (HOW TO DEFEND A EUROPEAN ARREST WARRANT CASE), https://handbook.ecba-eaw.org/j-conflicts-of-jurisdiction-and-using-eurojust/; already in 2006: response by ECBA to the Green Paper and the Working Paper on Conflicts of Jurisdiction and the Principle of Ne Bis In Idem in Criminal Proceedings presented by the European Commission. https://www.ecba.org/extdocserv/jurisdictionnebisinidemresponsefinal.PDF

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Check out:
ECBA Find a Lawyer: https://www.ecba.org/contactslist/contacts-search-country.php
ECBA Handbook on defending an EAW: http://handbook.ecba-eaw.org/
ECBA Statement on Mutual Recognition of Extradition decisions: https://www.ecba.org/content/index.php/124-featured/852-ecba-statement-on-mutual-recognition-of-extradition-decisions-june-2023#:~:text=The%20ECBA%20launched%20a%20Statement,right%20to%20freedom%20of%20movement