

The composition of the Court of Appeal and other aspects regarding the execution of the European Arrest Warrant (EAW)

Having been raised at the Supreme Court the question of the composition of the Court of Appeal to give a final decision in the proceedings for the execution of a EAW, which has been the subject of a number of Supreme Court decisions since December 2016, the present paper intends to provide the author's view on the subject, without the limitations inherent to the judicial decisions' object and methodology.

Taking as its starting point the essence of the EAW's regime, as laid down in Council Framework Decision 2002/584/JHA of 13 June 2002 (FD), transposed into the Portuguese legal system by Law 65/2003 of 23 August, it is intended to set out the reasons why the criminal chamber of the Court of Appeal is assigned the whole process of execution of the EAW, including the delivery of the final decision by the judge to whom the file has been distributed.

However, this view is hereby taken in a *de jure constituendo* perspective, in the light of the Supreme Court's peaceful understanding that the criminal chambers are composed of a rapporteur and two deputies in drawing up and signing the judgment ruling on the surrender of the wanted person, when the latter opposes the delivery.

(...)

13. Last, several Member States are already assigning to a single judge the competence for issuing a final decision on the delivery of the wanted person, in the framework of the proceedings for execution of an EAW, whether at first instance or at the appeal court's level.

Indeed, in a survey¹ informally circulated among the representatives of judges' associations from the EU Member States (including the United Kingdom) in the last Annual Meeting of the European Association of Judges (regional branch of the International Association of Judges – IAJ/IUM), which took place in Berlin on May 24-25, 2018, it was

¹ Regardless the initial purpose of collecting perfunctory information, to be confirmed subsequently, it was not possible to do so, and this information may not be accurate. In any case, it was decided to transmit here the information as obtained given its exploratory interest.

I thank José Igreja de Matos, Judge of Court of Appeal, President of the European Association of Judges and responsible for the international relations department of the ASJP, and Eleonora Viegas, Judge, who is also part of that ASJP department, have distributed the inquiries, promoted the response and collected them among the other associations of judges participating in the annual meeting of the AEJ, without which it would not be possible to obtain the data in question.

found that in 9 of those countries out of 15 responses obtained², the power to decide on the surrender of the wanted person who opposes such surrender was attributed to a single judge: Austria, Cyprus, Spain, Estonia, Poland, UK, Ireland³, Romania and Sweden.

For the proximity of our legal system and the systematization effort that it represents, it is also worth noting the solution introduced in the Spanish legal system with the statutes on mutual recognition of criminal resolutions in the European Union, approved by Law 23/2014 of 20 November, which integrates into a single text internal regulations arising from all framework decisions and directives on mutual recognition issued so far, as well as the subject-matter of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, on the European Investigation Order in criminal matters (EIO), as updated by Law 3/2018 of 11 June:

- The European arrest warrant, the resolution involving a sentence or measure imposing deprivation of liberty, the resolution on interim release monitoring measures, the probation decision, the European protection order, the resolution of freezing assets or assurance of evidence, the confiscation order, the resolution imposing financial penalties and the European investigation order.

Law 23/2014 attributes in its Articles 35(2) and 51(8)⁴ competence to decide on the delivery in execution of the EAW to the Central Judge of Instruction at the *Audiencia Nacional*,

² According to the responses to the inquiries referred to, the following countries confer the same jurisdiction to a collective court in Germany, Bulgaria, France, Greece, the Netherlands, Luxembourg. No reply was received for the other Member States.

³ Recently, a Judge from the High Court of Justice of Republic of Ireland, first instance court that decides de execution of the EAW in a single panel, brought two very important preliminary questions to the Court of Justice of the European Union concerning the enforcement of the EAW issued by Poland, which received a favorable decision from that court at the end of July of this year, as follows:

JUDGMENT OF THE COURT (Grand Chamber)
25 July 2018

(Reference for a preliminary ruling — Urgent preliminary ruling procedure — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 1(3) — Surrender procedures between Member States — Conditions for execution — Charter of Fundamental Rights of the European Union — Article 47 — Right of access to an independent and impartial tribunal)

In Case C-216/18 PPU
(...)

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=>

⁴ Articles 35.º and 51.º (8) read as follows:

- «Artículo 35. *Autoridades competentes en España para emitir y ejecutar una orden europea de detención y entrega.*

1. *Son autoridades judiciales competentes para emitir una orden europea de detención y entrega el Juez o Tribunal que conozca de la causa en la que proceda tal tipo de órdenes.*

before whom the discussion of the invoked grounds of refusal took place, and appeal of that decision to the Criminal Chamber of the same National Court.

Previously, Law 3/2003 of 14 March, in its Articles 2(2) and 18, granted competence for the preliminary acts and instruction of the process for executing an EAW to the ‘*juez central de Instrucción*’ who transmitted the steps taken to the “*Sala de lo Penal de la Audiencia Nacional*” (a collegiate court), which decided whether or not to surrender the wanted person without his consent, without appeal of this decision.

In other words, the Spanish legal order granted competence to a singular court to instruct the process of executing the EAW, and it was up to a collegiate body (*sala de lo Penal de la Audiencia Nacional*) to decide, without any possible appeal. Currently, the competence for all acts of the proceedings to execute an EAW, including the final decision on surrender of the wanted person, is vested in a singular court, with the possibility to appeal such decision before a collegiate court, a solution which is closer to the one proposed above.

2. *La autoridad judicial competente para ejecutar una orden europea de detención será el Juez Central de Instrucción de la Audiencia Nacional. Cuando la orden se refiera a un menor la competencia corresponderá al Juez Central de Menores.»*

- *Artículo 51. Audiencia del detenido y decisión sobre la entrega.*

(...)

8. *El Juez Central de Instrucción resolverá mediante auto que deberá dictarse en el plazo máximo de diez días tras la vista. Contra este auto podrá interponerse recurso de apelación directo ante la Sala de lo penal de la Audiencia Nacional, en los términos previstos en la Ley de Enjuiciamiento Criminal, el cual tendrá carácter preferente.*