



## STREAM Case Note No. [5]

[Case C-665/20]

### Abstract

On 29 April 2021, the Court of Justice of the European Union (Fifth Chamber) issued decision in case [C-665/20](#). The decision originated from a request for preliminary ruling made by the District Court of Amsterdam (Netherlands), concerning the execution of an EAW issued by the German judicial authorities against X. The case relates to the interpretation of the principle of “ne bis in idem” under Article 4(5) of FD EAW.

*First*, the Court of Luxembourg found that, under national law implementing Article 4(5) of FD EAW, the executing judicial authorities must enjoy a margin of appreciation to decide whether to refuse or not the execution of the EAW for the grounds referred to in that provision. Whereas under Article 3(2) of FD EAW the executing judicial authority has the obligation to refuse the execution of the EAW, pursuant to Article 4(5) of FD EAW the executing judicial authority retains a margin of appreciation to decide, based on the circumstances of each case, whether to refuse or not the execution of the EAW.

*Secondly*, the judgment sets out that, while there is a high level of trust between Member States, it cannot be presumed the same the level of trust towards third countries and their criminal justice systems. The Court found that, due to the distinct level of trust, the application of the “ne bis in idem” principle is different when the requested person has been finally judged “by a Member State” (Article 3(2) of FD EAW) or “by a third country” (Article 4(5) of FD EAW).

### Keywords:

Mandatory grounds for non-execution; Optional grounds for non-execution; The principle of “ne bis in idem”; Concept of “the same acts”; Margin of appreciation of the executing judicial authority; Leniency measures.



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## Background

In September 2019, the District Court of Tiergarten-Berlin (Germany) issued an EAW against X for the purpose of conducting criminal prosecution. The requested person was alleged of committing several serious offences against his partner and her daughter in October 2012 in Berlin.<sup>1</sup>

In March 2020, the requested person was arrested in the Netherlands and brought before the District Court of Amsterdam (the referring court). He opposed to his surrender to the German judicial authorities, claiming that he had been finally judged for the same acts referred to in the EAW in a third country, in Iran, thus invoking the principle of “ne bis in idem”.<sup>2</sup> He had been prosecuted and finally convicted for some of the acts to which the EAW referred and acquitted for the other charges.<sup>3</sup> After having served most of the sentence, he had benefited from a reduction of the sentence based on a leniency measure granted by the Supreme Leader of Iran.<sup>4</sup>

Based on these circumstances, the referring court addressed to the Court of Luxemburg questions concerning the interpretation of the principle of “ne bis in idem” under Article 4(5) of [Framework decision on the European arrest warrant](#) (FD EAW). This provision stipulates that the executing judicial authority may refuse to execute the EAW, if it obtains information during the procedure, that the requested person has been finally judged by a third State for the same acts to which the EAW refers. In case the requested person has been sentenced for the same acts, the application of this provision requires an additional condition that the sentence has been served, is being served, or may no longer be executed under the law of the sentencing country.

Whereas article 4(5) of FD EAW is included in the optional grounds for non-execution of the EAW, under the Dutch law implementing Article 4(5) the execution of the EAW for the grounds referred to in this provision must be refused. Thus, the referring court had doubts on whether Dutch law, which did not leave any margin of appreciation to the executing judicial authority, was in conformity with Article 4(5) of FD EAW.<sup>5</sup>

In addition, the referring court asked guidance from the Court of Luxemburg regarding the interpretation of the expressions “*the same acts*” and “*the sentence ... may no longer be executed under the law of the sentencing country*” used in the same provision. In respect of the latter, the referring court was insecure whether that expression could cover the leniency measure from which the requested person had benefited in Iran.

## The Court Decision

The first legal issue relates to the interpretation of Article 4(5) of FD EAW, whether by implementation of this provision in the national law of Member States, the executing judicial authority must be afforded a margin of appreciation while taking the decision on the execution or refusal of the EAW for the grounds referred to in that provision.<sup>6</sup>

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<sup>1</sup> Judgment of 29 April 2021, *Openbaar Ministerie v. X*, C-665/20, EU: C: 2021: 339, paragraphs 12 – 14 (hereafter *Openbaar Ministerie v. X* judgement)

<sup>2</sup> *Openbaar Ministerie v. X* judgement, paragraphs 15 – 17

<sup>3</sup> *Openbaar Ministerie v. X* judgement, paragraphs 18 - 19

<sup>4</sup> *Openbaar Ministerie v. X* judgement, paragraph 20

<sup>5</sup> *Openbaar Ministerie v. X* judgement, paragraph 26

<sup>6</sup> *Openbaar Ministerie v. X* judgement, paragraph 36

The Court ruled that, where Member States decide to transpose Article 4(5) of FD EAW into their domestic law, the executing judicial authority must enjoy a margin of appreciation to decide whether to refuse the execution of the EAW for the grounds to which that provision refers.<sup>7</sup>

At the outset, the Court reiterated that the FD EAW is founded on the high degree of trust that must exist between Member States and on the principle of mutual recognition, which require them, as a general rule, to execute any EAW issued in accordance with the FD EAW.<sup>8</sup> The Court recalled its settled case-law (particularly, [SF judgment](#)) that the executing judicial authorities are allowed to refuse the execution of an EAW only on grounds that are exhaustively listed in the FD EAW, which must be strictly interpreted. There are the grounds for mandatory non-execution of the EAW (Article 3) and grounds for optional non-execution of the EAW (Articles 4 and 4a).<sup>9</sup>

The Court of Luxembourg found that Member States have a margin of discretion to decide whether to transpose or not into their domestic law one or more of the grounds for optional non-execution listed in Article 4 of FD EAW.<sup>10</sup> By transposing a part of those refusal grounds, Member States would limit the situations in which the executing judicial authority may refuse the execution of the EAW. This would facilitate the surrender of the requested persons. That choice and the subsequent effect would go in harmony with the principles of mutual trust and mutual recognition, on which the FD EAW is founded.<sup>11</sup>

However, if Member States have transposed them, the executing judicial authorities cannot be required, under national law, to automatically refuse the execution of the EAW for those grounds, without having the possibility to assess the specific circumstances of the case.<sup>12</sup> This means that, national provisions implementing Article 4 of FD EAW cannot deny to the executing judicial authority the opportunity to determine, based on the circumstances of each case, whether the grounds for refusal are fulfilled. Otherwise, it would mean transforming to an obligation the option for refusal that the executing authorities have under that article. Thereby, the refusal which is regarded as an exception would practically become the rule.<sup>13</sup>

In addition, the Court interpreted the wording used in Articles 3 and 4 of FD EAW to define the distinction between them. Referring to Article 3, both the title “*mandatory non-execution*” and the verb “*refuses*”, indicate that the executing judicial authority has no discretion, rather it is obliged to refuse the execution of the EAW for the grounds referred to in that article.<sup>14</sup> On the contrary, the change of the verb into “*may refuse*” under Article 4 of FD EAW, means that the executing judicial authority must enjoy a margin of appreciation while taking the decision on whether or not to execute the EAW.<sup>15</sup>

Furthermore, the Court compared Article 4(5) with Article 3(2) of FD EAW, noting that their wording is almost identical, with the only difference that in the former provision the final judgment against the requested person has been delivered in a third country, whereas in the second “by a Member State”.<sup>16</sup> According to the Court, the lack of discretion of the executing judicial authority under Article 3(2) relates to the principle of “*ne bis in idem*” enshrined in Article 50 of the Charter, which impedes the prosecution of a person in a Member State for an offence for which he(she) has already been acquitted or convicted “*in the Union*”.<sup>17</sup>

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<sup>7</sup> *Openbaar Ministerie v. X* judgement, paragraph 67

<sup>8</sup> *Openbaar Ministerie v. X* judgement, paragraphs 37 – 38

<sup>9</sup> *Openbaar Ministerie v. X* judgement, paragraphs 39 – 40 and 46

<sup>10</sup> *Openbaar Ministerie v. X* judgement, paragraph 41

<sup>11</sup> *Openbaar Ministerie v. X* judgement, paragraph 41

<sup>12</sup> *Openbaar Ministerie v. X* judgement, paragraph 44

<sup>13</sup> *Openbaar Ministerie v. X* judgement, paragraph 47

<sup>14</sup> *Openbaar Ministerie v. X* judgement, paragraph 48

<sup>15</sup> *Openbaar Ministerie v. X* judgement, paragraphs 42 - 43

<sup>16</sup> *Openbaar Ministerie v. X* judgement, paragraph 49

<sup>17</sup> *Openbaar Ministerie v. X* judgement, paragraphs 50 – 51

The Court reinstated that the principle of mutual trust between Member States, particularly in their criminal justice systems, is based on the premise that all of them share a set of common values, enshrined in Article 2 of TEU.<sup>18</sup> Referring to the established case-law of the Court (*L and P judgment*),<sup>19</sup> that principle requires Member States to consider, save in exceptional circumstances and subject to verifications, that all other Member States respect EU law and the fundamental rights recognized by EU law.<sup>20</sup>

The Court highlighted that it cannot be presumed the same level of trust in the criminal justice system of third countries.<sup>21</sup> Therefore, the principles of mutual trust and mutual recognition which govern the EAW mechanism and that exist between Member States, are not automatically transferrable to judgments given by the courts of third countries.<sup>22</sup> Accordingly, unlike Article 3(2) where refusal is obligatory, pursuant to Article 4(5) the executing judicial authority must have a margin of appreciation, to verify and examine in which circumstances the requested person has been judged or sentenced in the third country, before deciding whether to refuse the execution of the EAW.<sup>23</sup>

The second legal issue is whether the concept of “*the same acts*” used in Articles 3(2) and 4(5) of FD EAW must be given a uniform interpretation.<sup>24</sup> The Court answered to this question in the affirmative.<sup>25</sup>

In that regard, the Court noted that, despite the distinction between the two provisions, the concept of “*the same acts*” is identical.<sup>26</sup> In addition, Article 4(5) of FD EAW does not refer to the law of Member States. Therefore, the meaning and the scope of the concept of “*the same acts*” under that provision must be autonomous and uniform throughout the Union.<sup>27</sup> The Court found that, based on the requirements of consistency and legal certainty, the concept of “*the same acts*” which is formulated identically in both provisions, must be given the same scope.<sup>28</sup>

The third legal issue relates to the interpretation of the expression “*the sentence ... may no longer be executed under the law of the sentencing country*” used in Article 4(5) FD EAW.<sup>29</sup>

The Court found that, in principle, this expression covers all the leniency measures provided for by the laws of the sentencing country which have the effect that the sanction imposed can no longer be executed. That expression includes all the leniency measures having such legal effect, regardless, of the seriousness of the facts, the authority which granted the measure, or of the considerations from which it arises.<sup>30</sup> Therefore, a remission of sentence granted by a non-judicial authority, which may be given also to persons convicted of serious acts and is not related to the penal policy, cannot be automatically excluded from the application of Article 4(5) of FD EAW.<sup>31</sup>

The Court stated that the principle of “*ne bis in idem*” enshrined in that provision is not intended to avoid impunity of the requested persons, rather it aims to ensure legal certainty by respecting the final decisions of public authorities.<sup>32</sup> Nonetheless, since the executing judicial authority must enjoy a margin of appreciation under Article 4(5) of FD EAW, that authority should be able to examine, among others, the circumstances in which the requested person has benefited from a general leniency measure, the

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<sup>18</sup> *Openbaar Ministerie v. X* judgement, paragraph 52

<sup>19</sup> For further analysis of *L and P* judgment, refer to Case Note No.1.

<sup>20</sup> *Openbaar Ministerie v. X* judgement, paragraph 53

<sup>21</sup> *Openbaar Ministerie v. X* judgement, paragraph 55

<sup>22</sup> *Openbaar Ministerie v. X* judgement, paragraph 59

<sup>23</sup> *Openbaar Ministerie v. X* judgement, paragraphs 55 and 60

<sup>24</sup> *Openbaar Ministerie v. X* judgement, paragraph 68

<sup>25</sup> *Openbaar Ministerie v. X* judgement, paragraph 83

<sup>26</sup> *Openbaar Ministerie v. X* judgement, paragraph 73

<sup>27</sup> *Openbaar Ministerie v. X* judgement, paragraph 72

<sup>28</sup> *Openbaar Ministerie v. X* judgement, paragraph 75

<sup>29</sup> *Openbaar Ministerie v. X* judgement, paragraph 84

<sup>30</sup> *Openbaar Ministerie v. X* judgement, paragraph 87

<sup>31</sup> *Openbaar Ministerie v. X* judgement, paragraph 88

<sup>32</sup> *Openbaar Ministerie v. X* judgement, paragraph 99

scope and the conditions of that measure.<sup>33</sup> When taking the decision on whether to refuse or not the execution of the EAW for those grounds, the executing judicial authority must take into account both: the purpose of preventing impunity and fighting against crime, and that of ensuring legal certainty for the requested person.<sup>34</sup>

## Key findings

**First**, in the judgment under analysis, the Court of Luxemburg made clear the distinction between the grounds for mandatory non-execution of the EAW referred to in Article 3 of FD EAW, and the grounds for optional non-execution of the EAW referred to in Article 4 thereof.

Based on Article 3 of FD EAW, the executing judicial authority has the obligation to refuse the execution of the EAW when it finds that one of the situations included in that article is present. Whereas pursuant to Article 4 of FD EAW, the executing judicial authority has the option to decide whether to refuse or not the execution of the EAW. According to the Court, this option is translated in the margin of appreciation that the executing judicial authority must enjoy while taking the decision. Although the conclusion of the judgment refers only to paragraph 5 of Article 4, it can be inferred from the reasoning of the Court that the same applies for all the paragraphs of that article.

Therefore, once Member States have transposed into national law one or more of the optional refusal grounds of Article 4 of FD EAW, they cannot transform those refusal grounds into mandatory, meaning that national law cannot obligate the executing judicial authority to refuse the execution of the EAW for the said grounds. Therefore, the executing judicial authority must enjoy under the national provisions implementing Article 4 of FD EAW, the same margin of appreciation that arises from that article.

**Secondly**, the Court of Luxemburg pointed out that the application of the “ne bis in idem” principle is different when the requested person has been finally judged “by a Member State” (Article 3(2) of FD EAW) or “by a third country” (Article 4(5) of FD EAW). The reason is, according to the Court, that the level of trust that exists between Member States is not the same with the trust that Member States have towards third countries and their criminal justice systems. While the former implies a high degree of mutual trust, it cannot be presumed the same for the latter.<sup>35</sup>

**Third**, the judgment guides the national courts to refer to the law of the sentencing country, which determines whether the sanction imposed on the requested person may no longer be executed, within the meaning of Article 4(5) FD EAW. Nevertheless, that determination under national law is not mandatory for the executing judicial authority, which may decide to refuse or not the execution of the EAW, based on the margin of appreciation it enjoys under Article 4(5) of FD EAW.

**Fourth**, the Court concluded that, despite the distinction between Articles 3(2) and 4(5) of FD EAW, the meaning and the scope of the concept of “the same acts” used in both provisions must be interpreted uniformly. Therefore, the case law of the Court on the interpretation of that concept under Article 3(2) of FD EAW may be applied by analogy ([Mantello](#) judgment).

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<sup>33</sup> *Openbaar Ministerie v. X* judgement, paragraph 101

<sup>34</sup> *Openbaar Ministerie v. X* judgement, paragraph 103

<sup>35</sup> *Openbaar Ministerie v. X* judgement, paragraphs 55 and 59