First Periodic Country Report: Belgium

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Introduction

Since the Tampere Council of 1999[1], the principle of mutual recognition of judicial decisions, has been referred as a cornerstone of judicial co-operation in the European Union (European Council 1999). This principle was swiftly introduced in 2002 after the 9/11 terrorist attacks, by the Council framework decision on the European Arrest Warrant and the surrender procedures between Member States (FD EAW, see recital 6). With it, the extradition of individuals between Member States stopped being a diplomatic enterprise and become a dialogue between their judicial authorities. (European Parliament, 2020).

In Belgium the FD EAW was brought into national law by the *Wet betreffende het Europees aanhoudingsbevel* of 19 December 2003 (the Belgian EAW Act). A controversial transposition that, only two years later, would force the Constitutional Court to request a preliminary ruling from Court of Justice of the European Union (CJEU)[2].

The first periodic country report for Belgium, aims to identify the some of the country's key notes regarding the issuing and execution of the European Arrest Warrant (EAW). The report is built upon the examination of case law which has been selected by the following criteria. First the number of instances and decisions involved in each case consequently elevate the diversity of the legal discussions addressed in each of them. Second, the novelty of the legal discussions. Third, their shared theme. While discussing different issues, the cases

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1 *European Council, Tampere European Council Presidency Conclusions, 1999.*

2 CJEU Judgement of 3 May [2007], *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, Case C-303/05, EU:C:2007:261. The Non-Governmental Organisation Advocaten voor de wereld VZW, sought the annulment of the Belgian EAW Act challenging the adequacy of the framework decision to regulate the EAW regime. The claim also questioned the compatibility of the non verification of dual criminality with the principle of legality in criminal proceedings as guaranteed in article 6(2) of the Treaty of the European Union.

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examined dealing with the execution of the EAW by Belgian authorities have all a strong political nature. Finally, their usefulness in testing the robustness of the EAW regime and their practical contribution to the concepts of mutual trust and mutual recognition in the EU.

The first section offers an overview of the procedure for issuing EAWs in Belgium, including the competent authorities involved and the existence of a mandatory ground for refusal based on fundamental rights. Its first subsection examines the decision of the CJEU in the *ZB v Belgium* case[3] on the qualification of "issuing authority", and the capacity of Belgian public prosecutor to issue EAW. The second subsection, offers a brief outline of the Belgian criminal procedure with a focus on Belgian EAWs issued for prosecution as understood by British courts .

The second section examines the arguments raised by Belgian authorities to refuse the execution of EAWs. The analysis provided in this section is based on copies of the original decisions that have been obtained for the purpose of this report. In addition, the media coverage of the selected cases has also facilitated access to important information and allowed to scrutinize aspects of the cooperation under EAW that are generally not open to the public gaze. In the *N.J.E c*ase, Belgian authorities assessed the incommunicado regime applied by Spain to refuse the execution of an EAW. The assessment of the *Puig* case will show how Belgian executing authorities have dealt with the independence and impartiality of the issuing authority and its impact to the right to a fair trial. Third, the (not yet concluded) *Valtonyc* case offers procedural limits to mutual recognition principle when balanced with the executing authority's duty to verify the information contained in the EAW.

The third section interprets the key issues faced, and the solutions adopted by Belgium considering the principle of mutual trust.

Finally as a methodological note we want to stress the difficulties encountered when reporting on the cooperation by Belgium under the EAW regime. The lack of accessibility to case law seriously hinders the study of the Belgian authorities' solutions and interpretation of the EAW. While this has been already highlighted in the past (Weyembergh, 2013), the question remains unaddressed and the absence of centralized repository of publicly accessible EAW case law, is today an important obstacle to research on Belgium's EAW implementation.[4]

3 The case examines how the competence of the Belgian public prosecutor to issue EAW was validated by the CJEU for the specific case of executing custodial sentences already served by a magistrate. CJEU, 12 December 2019, case C-627/19 PPU, ECLI:EU:C:2019:1079, ZB.

4 While progress has been made in the gathering and sharing of data of Member States cooperation, Belgium remains ungenerous when it comes to provide it (See European Commission, 2017 and European Parliament, 2020). From the available figures reported, it is safe to argue that cooperation between judicial authorities in the EU remains a peer-to-peer exercise, where deficiencies or discrepancies are informally resolved and amended.

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

The arrest and surrender of persons between Belgium and another Member States is governed by the 2003 Belgian EAW Act, in conjunction with the Belgian Law of 20 July 1990[5] on pre-trial detention and the Belgian Code of Criminal Procedure[6].

A Belgian EAW may be issued for prosecution purposes and for the execution of custodial sentences (Article 2 (1) of the Belgian EAW Act). They must refer to acts punishable by a custodial sentence or a detention order of deprivation of liberty for a maximum of at least twelve months or, where the sentence has already been served or detention order has been adopted, if they are at least four months (Article 3 of the Belgian EAW Act).

In 2018 the Board of Prosecutor Generals decided that "EAW's for the execution of sentences would not be issued unless the sentence or the total of the sentences pronounced exceeded 3 years of imprisonment and at least 2 years of that sentence remained to be executed. Exceptions to the rule are foreseen for specific types of crimes such as crimes against minors, sexual offences or terrorism, and also in the event of multiple EAWs requests" (Van Gaever, 2018, question 22.b)

Mirroring Article 8(1) of the FD EAW, Article 2 of the Belgian EAW Act, an EAW must contain: the details of the requested person and those of the issuing authority, an indication of an enforceable judgment[7]; the nature and legal classification of the offence; a description of the circumstances in which the offence was committed; the penalty imposed in the case of a final judgment, or the scale of penalties provided by law for the offence (Article 2 (1 to 6) of the Belgian EAW Act).[8]

I.1. Competence for issuing EAWs in Belgium

The competence to issue EAW generally relies on the investigating judge. Only in three circumstances the public prosecutor, who is not a judicial authority, might be competent to issue EAW: i) when the EAW targets minors (individuals under 18); ii) for the execution of sentences or security measures already decided by a judge and iii) for EAWs based on arrest warrants issued by courts in the trial phase (Van Gaever, 2018, question 21).

The EAW and its details need to be prescribed in the form set by the Annex of the FD EAW (Article 2 (7) Belgian EAW Act). The person responsible for filling the EAW form is the investigating judge, or when applicable the public prosecutor. In some occasions, under the supervision of the judge or public prosecutor, administrative staff can also fill the form (Van Gaever,2018 question 22.b).

5 Law of July 20, 1990 on pre-trial detention, coordinated by the Law of October 31, 2017, BS 29.11.2017

6 Criminal Procedure Code of the Kingdom of Belgium. Amended in 2019.

7 An arrest warrant or any other enforceable judicial decision having the same force.

8 CJEU, 6 December 2018, IK Case C 551/18 PPU, ECLI:EU:C:2018:991 In the IK Case the CJEU discussed the requirement of lawfulness set out in the obligation to indicate the penalty. The controversy resulted from the failure by the Belgian issuing authority to indicate in the EAW the existence of an additional sentence of conditional release imposed on the requested person. The Belgian court of Cassation requested the preliminary ruling of the CJEU on the matter. The CJEU concluded that the failure to indicate the additional sentence in the EAW "does not, on the facts of the case in the main proceedings, preclude the enforcement of that additional sentence, on the expiry of the main sentence after an express decision to that effect is taken by the national court with jurisdiction for the enforcement of sentences, from resulting in deprivation of liberty" (para 70).

I.2. The competence of the public prosecutor as an issuing authority [ZB, CJEU, 2019)

In the ZB case[9], the CJEU assessed the qualification of Belgian Public prosecutors as valid issuing authorities of EAWs seeking the execution of custodial sentences. On the 24th of April 2019, the Brussels Public Prosecutor issued an EAW to the Netherlands pursuant the execution of ZB's custodial sentence previously served by the Brussels Raadkamer or Chambre du Conseil (Court in Chambers)[10]. Pursuant the EAW the Dutch authorities detained ZB on the 3rd of May 2019. Based on the information provided, the executing authority recognized that despite not being a judicial authority, the Belgian prosecutor "participated in the administration of justice and act independently, without being subject, directly or indirectly, to individual orders or instructions from the executive branch" (para.12).[11]

Recalling the CJEU's preliminary ruling in Joined cases OG (C-508/18) and PI (C-82/19 PPU),[12] the Amsterdam Court of First Instance casted doubts as to whether the EAW issued by the Belgian prosecutor fulfilled the requisites set by the CJEU. In particular, the requirement concerning the proportionality assessment of an EAW being subject to "to judicial review which fully satisfies the requirements inherent in effective judicial protection" (para. 16). As a result, the Dutch court, halted the execution of the Belgian EAW and sought the clarification of the CJEU by means of an urgent preliminary ruling (para.17).[13]

Following the arguments raised in OG and PI, the Court described the two-tier system of protection of procedural rights and fundamental rights of a person targeted by the EAW (para.29). In a first level, the observation of rights refers to the adoption of a national arrest warrant. The judicial proceeding that determines the culpability of the requested person enables the establishment of a presumption of observation of the safeguards and rights.[14] In a second instance, the level of protection requires the issuing authority to be capable of controlling and examining in an objective and independent manner the proportionality of the EAW (para.31). In is reasoning, the CJEU drew a distinction between EAWs issued for prosecution of crimes from those issued for seeking the execution of a custodial sentence (para.33). The CJEU admitted that the existence of a previous enforceable judgment imposing a custodial sentence justified a presumption of compliance with the procedural rights of the targeted person (para. 34 to 36).

The CJEU concluded that "(…) the FD EAW does not preclude legislation of a Member State conferring the power to issue an EAW for the purpose of executing a custodial sentence on an authority which, while participating in the administration of justice in that Member State, is not itself a judicial authority, and that

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9 CJEU, 12 December 2019, case C-627/19 PPU, ECLI:EU:C:2019:1079, ZB.

10 Which in English literally translates as "Court of advise".

11 The Rechtbank Amsterdam (Amsterdam Court of first Instance) noted that the Belgian EAW Act did not provide the defence with the possibility to bring an independent action against the decision to issue the EAW"; CJEU judgment of 12 December 2019, 627/19, ZB Case, C:2019:1079, ECLI:EU:C:2019:1079 (para.12).

12 CJEU, *27* May 2019, joined cases C-508/18, OG, and C-82/19 PPU, PI

13 The question raised was the following: Does an EAW warrant issued by a Belgian Prosecutor aimed at executing a custodial sentence imposed by the decision of a judge or a court, fulfils the requirements of the decision to issue a EAW and in particular, the proportionality of the requisite that this decision must also be subject to a judicial remedy that fully meets the requirements of effective judicial protection? CJEU judgment of 12 December 2019, 627/19, ZB Case, C:2019:1079, ECLI:EU:C:2019:1079

14 See AG Sánchez-Bordona, Opinion of 26 November 2019 in C-627/19 PPU, Belgian Public Prosecutor's Office, para. 24 and para 26. See also Baudrihaye-Gérard (2020) Can Belgian, French, and Swedish prosecutors' issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors (EU LAW Analysis).

does not provide for a separate legal remedy against that authority's decision to issue such an EAW"(para. 39). In that way, the CJEU backed the competence of the Belgian public prosecutor to issue EAW pursuing the execution of custodial sentences.

I.3. EAW issued for prosecution purposes, case readiness.

The validity of the Belgian EAWs issued for prosecution purposes has found opposition based on a lack of decision to try and charge from the issuing authority. For the purpose of this report, we will only briefly recall the reasoning of the Belgian procedure for issuing EAWS offered by the Irish High Court in McPhillips and Hatherley (2020)[15] and more recently by the Courts of England and Wales in Killoran (2021)[16].[17]

In Belgium the criminal procedure starts with the public prosecutor in charge of directing the public criminal prosecution. Although a public prosecutor has certain investigatory powers, if coercive measures are required, the file is forwarded to the investigating judge, also known as examining magistrate. The investigating judge, investigates both for and against the subject and is authorised to request coercive measures such as house searches or investigative taps. When a sufficient indication of guilt is observed, the investigating judge might also request the arrest of the suspect and keep him or her in detention. Whenever the suspect is found in another EU Member State, it is the investigating judge who issues the EAW for the purposes of criminal prosecution in observance of the conditions laid down by the Law of 20 July 1990 on pre-trial detention (Article 32 (1) of the Belgian EAW Act)[18]. It is important to note in these cases, the investigating judge issuing the EAW does not make any final determination of guilt or innocence of the suspect. Once the judicial investigation is concluded, the case is sent back to the public prosecutor. At this stage the public prosecutor can either 1) ask for the case to be dismissed, 2) ask for more investigations to be carried out, or 3) refer the case to the Court in Chambers. It is at the Court in Chambers that the judge decides whether a trial might be brought upon the suspect or not.

The Court in Chambers, is a pre-trial chamber formed by a judge, a member of the public prosecutor's office and a registrar. The Court in Chambers regulates the procedure at the end of a judicial investigation, it evaluates the judicial investigation and verifies whether it has provided sufficient grounds to summon the suspect before the criminal courts. (Deruyck, 2020). Before the Court in Chambers, the judge examines the case together with the parties and legal representatives. At this point, 1) the case can be dismissed, 2) the accused person can accept the charges or 3) the case can be sent for trial in another court.

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[15] High Court of Ireland Decisions, (08 April 2020), Minister for Justice and Equality v McPhillips and Minister for Justice and Equality v Hatherley [2020] IEHC 414 .

[16] England and Wales High Court, (12 August 2021), Jemma Killoran v Investigative Judge, Antwerp Court of First Instance, Belgium, [2021] EWHC 2290. Para. 48-50.

[17] The description offered in the Killoran case are based on two expert reports produced respectively by Belgian lawyers Mr. Christophe Marchand and Mr Hans Van der Wal; and the Clarification on the Belgian Judicial System served provided by the Belgian authorities as part of the evidence in McPhillips and Hatherley.

[18] 20 JULI 1990. - Wet betreffende de voorlopige hechtenis. July 20, 1990. - Law on pre-trial detention. See chapter II order of participation and Chapter III (Articles 16- 20)

The controversy in executing Belgian EAWs issued for prosecution, rely on whether there is a decision to charge or try behind those orders, as otherwise required by national implementations of the EAW FW Decision[19]. In the Killoran case (2021), the defence argued that the decision to charge and to try was only adopted by the Court in Chambers at the end of the judicial investigation. As a result the EAW issued for prosecution could not be regarded as being "trial ready". This argument had been successfully held earlier before the Irish High Courts in the case of McPhillips and Hatherley[20]. However while the EAW was rejected in the latter it was executed in the former. The explanation behind the opposite outcomes is found in the reply offered by Belgian authorities to the requests for further information.

In McPhillips and Hatherley, the Belgian prosecutor did not provide any insight on what would occur in the event of surrender, and this lack of concreteness lead to High Court of Ireland to refuse the EAW.[21] Alternatively in the more recent Killoran case, when replying to the same question the Belgian public prosecutor stated that "*In light of the existing evidence in this case, I have already decided that once the Examining Magistrate refers the case back to me, I will refer it to the Council Chamber so that the case may go to a full criminal trial*" (Killoran para.7).[22] This was sufficient for the England and Wales High Court to observe that a decision to try had been made (Killoran, para.52). It follows that the validity of the Belgian EAWs issued for prosecution purposes needs to be considered on a case by case basis by the execution authority and that the insights given by the issuing authority on its intention to charge and try, are critical for the assessment.

[19] s. 20 of the Irish European Arrest Warrant Act 2003 ; article 12 A of the England and Wales Extradition Act 2003.

[20] Minister for Justice and Equality v McPhillips and Minister for Justice and Equality v Hatherley (Approved) [2020] IEHC 414 (08 April 2020).

[21] Before refusal, the Irish High court asked for additional information, "Will the decision to charge and try be taken at a still subsequent stage before a pre-trial chamber judge, at which stage criminal proceedings can be initiated?" The response from the Belgian authorities stated that "the suspect once surrendered, would have to be questioned before being freed on bail or remanded in custody", and "the decision to charge and try will be taken at a later stage (when the investigation is closed by the investigating judge) by the public prosecutor." McPhillips para. 7.

[22] "In light of the existing evidence in this case, I have already decided that once the Examining Magistrate refers the case back to me, I will refer it to the Council Chamber so that the case may go to a full criminal trial". Killoran Para.7

Section II – The execution of EAWs: national judicial authorities as monitors of trust

In Belgium, the decision to execute EAW is adopted by the judge of the Court in Chambers acting as an authority of first instance. The Magistrate from the *Kamer van Inbeschuldigingstelling* (KI or Court of Appeal)[23], has the competence of an appellate authority against the decisions of the Court in Chambers. Ultimately, the Cassation Court verifies whether a contested decision by the KI should be annulled for breach of the law or for a failure to comply with substantial or prescribed forms[24] (Deruyck, 2020)[25].

From both procedural and substantive perspective, the existence of a mandatory ground for refusal on fundamental rights, has strongly defined the functioning of the Belgian model of cooperation through EAW. In light of Article 4(5) of the Belgian EAW Act, executing authorities are obliged to reject an EAW whenever they find "serious reasons to believe that the execution of the surrender mandate would infringe the fundamental rights of the person concerned".

The three cases examined show the arguments followed by Belgian executing authorities to refuse Spanish extradition requests pursuant EAWs. The first case (N.J.E) deals with the application of the mandatory ground of refusal on human rights in light of the risk of torture and inhuman treatment or punishment. The second case (Puig Gordi) applies the fundamental rights ground of refusal to the lack of competence of the issuing authority in light of the right to fair trial. The third case (Valtonyc) offers an example of the procedural limits of mutual recognition and of the prevalence of the Belgian constitutional order. As it will be explained, in Belgium the limit of mutual trust and the presumption of fundamental rights compliance, are strongly determined by the defense's capacity to rebut them at the eyes of the executing authority.

II.1. Balancing mutual trust and the presumption of respect of human rights (N.J.E)

N.J.E is a Basque linked to the Basque resistance and separatist movement ETA (*Euskadi ta Askatasuna*), who was subject of four arrest warrants by Spain. The first EAW from July 2004 on the charges of attempted murder and terrorism for acts committed in 1981 in Bilbao, the second EAW from December 2005 on charges of participation to a criminal organisation, terrorism, manslaughter, aggravated assault, and murder of the Lieutenant Colonel of the Guardia Civil, Ramón Romeo.

On 16th October the Court in Chambers of Ghent declared the EAWs enforceable.[26] After the decision was appealed by the defence, on the 31st October 2013 the KI of Ghent rejected the surrender of N.J.E having appreciated a serious risk that the extradition would infringe the prohibition of torture under Article 3 of the

[23] The KI rules by way of a judgment. First, it has the authority to control ongoing judicial investigations and, if necessary, declare a certain investigative act null. This is referred to as the classic supervision of judicial investigations.

[24] Hof van Cassatie is the highest court in Belgium and rules on the legality of judicial decisions. It is not to be seen as a third appeal court but constitutes a special judicial procedure. It ensures the unity of jurisprudence and the evolution of the law.

[25] See also Declerq, Beginselen van strafrechtspleging, Mechelen, Kluwer, 2007, 1866-1901 and Deqlerq, De cassatie procedure in strafzaken, Leuven, Wolters, 1988.

[26] Ghent Court in Chambers, 16 October 2013, N.J.E. The decision is not public. See Meysman · Belgium and the European Arrest Warrant,2016.

Convention.[27] The decision was confirmed in November 2013 by the Court of Cassation.[28] Almost two years later, on 8 May 2015 a third EAW was issued against N.J.E. Again, the KI of Ghent examined the case by reference to the arguments raised in 2013 refused the execution of the new EAW.[29]

II.1.1. Incommunicado detention regime as a ground for refusal [N.J.E, CC- KI-CASS, 2013]

Pursuant the EAW orders issued in 2004 and 2005 by the Spanish National High Court (Audiencia Nacional), N.J.E was arrested on the 9th October 2013 in Belgium. By order of the 17th October 2013, the Court in Chambers of Ghent declared the EAW enforceable.[30]

The defence appealed and requested the refusal of the EAW based on the existence of significant indications that a surrender would undermine her fundamental rights as provided by Article 6 of the TEU.[31] To support the claim, the defence relied, among others, on a report from the European Committee for the Prevention of Torture and Inhuman Treatment or Punishment (CPT) of the Council of Europe (Council of Europe, 2011). This report made specific reference to the procedures and detention conditions of persons suspected of maintaining relations with, or belonging to, ETA. The defence argued that in Spain the offences for which N.J.E was accused were subject to an "incommunicado detention regime", which could be accompanied by torture, and very limited contact with family and legal assistance.

The public prosecutor adopted a narrow interpretation of the ground of refusal foreseen in Article 4(5) of the Belgian EAW Act, defended the democratic tradition of Spain and endorsed a presumption of trust in Spain's judicial system. The prosecutor concluded that the exception of article 4(5) could only be invoked in cases of flagrant violations of human rights and that[32]. In the view of the public prosecutor, the reports from international organisations, did not provide "sufficient number of concrete elements" to infer a potential infringement on N.J.E fundamental rights. Following the criteria adopted in the previous case of Gomez-Ugarte (2004),[33] the prosecutor argued that a non-binding report by an international organisation was insufficient to substantiate a justified fear of an infringement of human rights.

But the KI of Ghent took a different path. The Court echoed the contextualization provided by the defence in its conclusions, regarding the historical background of the Spanish-Basque conflict as well as the personal circumstances of N.J.E since 1981, when the events motivating the EAW took place (N.J.E, KI, 2013, point 2.2

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27 Ghent Court of Appeal, Kamer van Inbeschuldigingstelling (KI), 31 October 2013. N.J.E. 2013/FP/16

28 Court of Cassation, 19 November 2013, N.J.E AR P. 13.1765.N

29 Ghent Court of Appeal, Kamer van Inbeschuldigingstelling (KI), 14 July 2016, N.J.E, KI 2016/FP/, The decision is not public.

30 The defence of N.J.E vested its main arguments on the competence of the Belgian courts to trial the case based on the resident status of N.J.E who had irregularly lived i Belgium for years (Article 4.4 of the Belgian EAW Act). By order of Court in Chambers in Ghent of 16 October 2013, the EAW were declared enforceable.

31 Supra (point 2.1) "The appellant requests that the declaration of enforceability be refused on the basis of Article 100a of the Treaty. 4,5° [Belgian EAW Act] because there would be serious reasons to fear that the implementation of the European arrest mandate with its surrender to Spain would undermine its fundamental rights, as confirmed by Article 6 of the Treaty on European Union."

32 In cassation referred to this test was described as follows "In view of this principle of mutual trust between the member states, the refusal to surrender must be justified by evidence indicating a clear danger to the fundamental rights of the person concerned and capable of reversing the presumption of respect for these rights which the issuing state benefits from. Court of Cassation, 19 November 2013, AR P. 13.1765.N, para. 4.

33 Hof van Cassatie, 26 May 2004, Gomez Ugarte, AR P.04.0779. F.

to 2.4). Invoking its obligation to respect fundamental rights as embedded in Belgium's constitutional tradition, the Court referred to the incommunicado regime applied in Spain to persons suspected for belonging to ETA as follows: "There are, in the opinion of the Court, in the present case, serious reasons to believe that the execution of this European Arrest Warrant would undermine the aforementioned fundamental rights, since suspects of terrorist offences in Spain must undergo a different regime of deprivation of liberty in inhumane circumstances which may be accompanied by torture and very limited contact with the outside world (family, lawyer and aid workers), as there are indications there. These inhumane abuses have recently been denounced in reports by the European Committee on prevention of torture and inhumane treatment or punishment" (N.J.E,KI, 2013, point 2.6).

The KI challenged the presumption of Spain's compliance with its fundamental rights obligations towards former members of the Basque resistance, by stating"[f]irst and foremost there is never a presumption of respect for human rights, since the person object of an EAW has the right to demonstrate that there are serious reasons to fear a breach of human rights" (N.J.E, KI, 2013, point 2.7). To sustain its position, the KI argued that the CPT report had provided sufficient evidence to rebut the presumption of Spanish compliance, as it supported the "grave fears" concerning the Spanish respect of human rights of "ex-members of the Basque resistance" (N.J.E KI, 2013 points 2.6 and 2.7).[34]

Finally, the KI critically questioned the existence of a threshold of certainty to refute the presumption of compliance. The Court argued that "nowhere does the law require that it be demonstrated that fundamental rights would be violated with complete certainty" (N.J.E, KI, 2013, point 2.7).

In view of this, the KI refused the execution of the EAW. On November 2013, the decision was confirmed by the Belgian Court of Cassation.[35]

II.1.2. The Aranyosi and Căldăraru precedent and the dynamic nature of risk assessments. [N.J.E, Court in Chambers, KI, ECtHR 2015-2020]

Two years later, in May 2015 a new EAW was issued by the Spanish National High Court for the offence of "terrorist murder" based on Spanish law. On 29 June 2016, the Court in Chambers of Ghent again refused the execution of the new EAW.[36] Following an appeal by the Federal Prosecutor's Office from 14 July 2016, the KI of Ghent upheld the decision of the Court in Chambers, recalling the 2015 Concluding Observations on Spain of the UN Human Rights Committee that was submitted by N.J.E. The KI indicated the absence of new elements requiring the Court to differ from its decision to refuse the extradition adopted back on 31 October 2013. The reference to the UN Human Rights Committee, which again "urged" Spain to put an end to the degrading

[34] "These inhumane abuses have recently been denounced in reports by the European Committee on prevention of torture and inhumane treatment or punishment {CPTJ of the Road van Europe of 2011. Reports from international organizations support these grave fears."

[35] Court of Cassation, 19 November 2013, NJE, AR P. 13.1765. Published

[36] The Decision is not Public.

conditions that suspects of offences with alleged terrorist motives, was sufficient for the examining magistrate to again overturn the presumption of observance of human rights (Human Rights Committee, 2015, para.17).[37]

On 15 July 2016, the Federal Prosecutor's Office lodged an appeal arguing that there had been a breach of article 4(5) of the Belgian EAW Act. The appeal considered that the Human Rights Committee's observations did not constitute sufficient proof over the risks to the rights of N.J.E. In a judgment of 27 July 2016.-The Court of Cassation dismissed the appeal.[38]

Only a few months earlier, in April 2016, the CJEU's had issued its decision in the *Aranyosi and Căldăraru* case.[39] In this judgment, the CJEU established a ground breaking "two step test"[40] enabling the refusal of EAWs based on the prohibition of torture and inhuman or degrading treatment or punishment, as enshrined in Art. 4 Charter of Fundamental Rights.

How did the Aranyosi and Căldăraru test play in N.J.E 2013 and 2016 decisions?. In both cases the Belgian authorities relied on information that, in their view, showed a risk (in abstracto) that the execution of EAW against N.J.E could lead to an infringement of the prohibition of torture (First step). Moreover based on the available information surrounding the personal circumstances of N.J.E, the Courts were also convinced (in concreto) that the surrender could lead to an infringement of N.J.E's human rights (Second Step).

It should be noted that by the year 2016, the reports from the CPT and other international organisations had been repeatedly used by the ECtHR to condemn Spain for the violation of Article 3 of the Convention (See Alvarez Rodriguez, 2018). By 2016, year when the surrender of N.J.E was dismissed for the second time, the ECtHR had condemned Spain on seven occasions for violations of the prohibition of torture in cases involving Basque pro-independentists.[41]

When assessing the evidence of those risks, pursuant to Art. 15(2) FD EAW, the *Aranyosi and Căldăraru* test requires, as an "ongoing step" the existence of dialogue between the executing and the issuing authority. Precisely, in 2019 the ECtHR in Romeo Castaño v Belgium, highlighted the lack of dialogue between the Belgian authorities and its Spanish counterparts when considering "whether there was a real and concrete risk of violation of the Convention in the event of surrender" (para 89). This helped the ECtHR to conclude that Belgium had failed to thoroughly investigate the request from the Spanish authorities to surrender N.J.E.

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37 UN Human Rights Committee,2015 para.17: "The Committee reiterates its previous recommendations (CCPR/C/ESP/CO/5, para. 14) and recommends once again that the State party [Spain] should take the necessary legislative measures to put an end to incommunicado detention and to guarantee the rights of all detainees to medical services and to freely choose a lawyer whom they can consult in complete confidentiality and who can be present at interrogations."

38 The decision is not public.

39 CJEU (Grand Chamber), Judgement April 2016, Aranyosi and Caldararu, Joined Cases C- 404/15 and C-659/15 PPU/ Judgement.

40 See on this matter T. Wahl, 2020, Refusal of European Arrest Warrants due to Fair Trial Infringements: Review of the CJEU's Judgment in "LM" by National Courts in Europe. Eurocrim 2020/4. See also C. Bracken, 2018 Talk to me like Lawyers do – Celmer returns to the High Court of Ireland.

41 ECtHR Judgement Iribarren Pinillos v.Spain, no 36777/03 from 8 January 2009; ECtHR San Argimiro Isasa v. Spain no 2507/07 28 September 2010; ECtHR Beristain Ukar v. Spain, no.40351/05 8 March 2011; ECtHR judgement Otamendi Egiguren v. Spain, no 47303/08 12 December 2012; ECtHR Judgment Ataun Rojo v. Spain no 3344/13, 7 October de 2014; ECtHR Judgment Beatriz Etxeberria Caballero v. Spain no. 74016/12, 16 September 2014; ECtHR Judgment Arratibel Garciandia v. Spain, no 58488/13, 5 May 2015; ECtHR Judgment Beortegui Martínez v. Spain, no 36286/14, 31 May 2016; Since then and to this day, the list has been increasing : ECtHR Judgment Portu Juanenea and Sarasola Yarzabal v. Spain no.1653/13, 13 February 2018 ; ECtHR Judgment Gonzalez Etayo v Spain no. 20690/17, 19 January 2021.

Looking at the Strasbourg's assessments in the judgments that had condemned Spain at the time of the second EAW refusal, it is worth mentioning that in most cases the violation was not grounded on the material aspect of the prohibition of torture in Article 3 ECHR, meaning the observance by the ECtHR of tortures. Instead, the violations were generally based on an infringement of the procedural limb of the prohibition, that is, the failure by the Spanish competent judge to investigate the allegations of torture raised by the victims (See Alvarez Rodriguez, 2018).[42] While the Belgian executing authorities did not explicitly referred to this, the similarities between the ECtHR cases where Spain was condemned and the N.J.E case, could have very well casted doubts on the Spanish account and influenced the decision adopted in 2016 by the executing authority.

Right after the condemnatory sentence of the ECtHR in Romeo Castaño v Belgium,[43] [44] a fourth EAW was issued in October 2019 requesting the surrender of N.J.E. Noticeably, during the years that preceded the order, ETA had undergone a process of disarmament and dissolution, including a permanent ceasefire in 2011 that formally finalised on 3 May 2018, with the announcement of its definitive dissolution.[45] In addition, three years before (in 2015) Spain had amended its incommunicado regime to align it with the provisions of the EU Directive 2013/48 (See on this topic R. Juan Sánchez, 2017).[46] In this new context, the Court in Chambers agreed to the surrender of N.J.E. The decision was upheld on appeal after the KI requested information from the Spanish authorities on the conditions of detention and procedural rights of N.J.E.

In its response, the Spanish judge ensured that N.J.E would not be detained under the incommunicado regime. In the decision from 5 November 2020, the KI was convinced that in the event of surrender, NJE would not be subject to detention conditions leading to inhuman or degrading treatment or to an incommunicado regime.[47] Although the report of the CPT of the Council of Europe from November 16, 2017 (Council of Europe, 2017) confirmed that the incommunicado regime could still be applied in Spain, this time the Belgian executing

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42 Fernando Grande-Marlaska current Ministry of Interior of Spain, was the judge in charge of issuing the EAWs against N.J.E in 2004-2005. He was also the instructing judge in six of the ten cases in which Spain has been condemned by ECtHR for violation of the prohibition of torture in light of Article 3 ECHR against basque pro-indepedentists. At the date of writing, the cases are the following: ECtHR Judgment Ataun Rojo v. Spain no 3344/13, 7 October de 2014; ECtHR Judgment Beatriz Etxeberria Caballero v. Spain no. 74016/12, 16 September 2014; ECtHR Judgment Arratibel Garciandia v. Spain, no 58488/13, 5 May 2015; ECtHR Judgment Beortegui Martínez v. Spain, no 36286/14, 31 May 2016; ECtHR Judgment Portu Juanenea and Sarasola Yarzabal v. Spain no.1653/13, 13 February 2018; ECtHR Judgment Gonzalez Etayo v Spain no. 20690/17, 19 January 2021.

43 ECtHR, judgment of 9 July 2019, Romeo Castaño v Belgium, no. 8351/17 ECHR. The ECtHR argued in 2016 the KI "did not conduct a detailed, updated examination of the situation prevailing in 2016 and did not seek to identify a real and individualised risk of a violation of N.J.E.'s" (para. 86). As it is recognised by the same ECHR the legal adequacy of the decision reached by the Belgium courts when dismissing the Spanish EAW against N.J.E were however adequate (para`. 84 and 85). Nevertheless in balancing the competing interests between the "procedural limb in article 2 of the ECHR" raised by the daughter of Castaño and the rights of N.J.E under article 3 of the ECHR, the European court considered that "the examination conducted by the Belgian courts during the surrender proceedings was not sufficiently thorough for it to find that the ground they relied on in refusing to surrender N.J.E., to the detriment of the applicants' rights, had a sufficient factual basis" (para 89).

44 See for analysis of the case: Zamboni, 2019; von Danwitz,2019; Top and De Hert,2020

45 See "Basque separatist group ETA announces dissolution, The Guardian, 2018.

46 Ley 41/2015, 5 Octubre 2015, de modificación de la Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las garantías procesales. The amendment to the Spanish procedural law aimed to align the requirements set by the EU Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

47 Brussels KI, 5 November 2020, (page 8, para.4) "It also appears from the documents filed by the prosecution regarding the detention conditions that [the plaintiff] would be detained in the penitentiary centre Madrid VII in Estremera, about seventy kilometres from Madrid. There are photographs down of the aforementioned facility and the conditions of detention are described in detail. Neither from the aforementioned information and photographs, nor from the fact that [the claimant] would be detained a few hundred kilometres from her former place of residence in the Basque Country which would make her distant from that former place of residence, can it be inferred that [the claimant] would be subjected to inhuman or degrading treatment.

authority considered that the risk did not outweigh the apparent guarantees provided by the Spanish court. The decision was upheld in cassation.[48]

II.2. The fundamental rights ground of refusal and the lack of competence of the issuing authority as part of the right to fair trial (Puig i Gordi)

Lluis Puig i Gordi was the Catalan minister of culture during the Catalan referendum for independence back in October 2017. Briefly after the referendum took place, Puig fled to Belgium together with other members of his cabinet, including former Catalan President Carles Puigdemont, former health Minister Toni Comin, and former education Minister Clara Ponsatí. To this day, Puig has been the object of three EAWs by Spanish authorities for the offences of disobedience and embezzlement. None of them have been executed. The first EAW issued by the Audiencia Nacional (National High Court) on the 3rd of November 2017, was withdrawn on the 5th of December 2017.[49] The second EAW was issued on 23 of March 2018 under the offence of disobedience. On May 2018, the Brussel Court in Chambers declared the EAW to be invalid for not being supported by a national arrest warrant.[50]

On 4 November 2019, the Spanish instructing magistrate issued a third warrant for the offences of disobedience and embezzlement. On the 7 of August 2020, the Brussels Court in Chambers refused the execution after considering that the Spanish issuing authority lacked jurisdictional competence.[51] On the 7th January 2021, the KI of Brussels, upheld the decision and rejected the execution of the third EAW against Puig on the grounds that the Spanish issuing authority was not competent to know the case and the risks to Puig's right of fair trial, if he was to be surrendered to Spain.[52]

II.2.1. A duty to verify the competence of the issuing authority [Puig, Brussels Court in Chambers, 7 August 2020]

The third EAW against Puig was issued by Spain on the 4th November 2019. The Brussels Court in Chambers assessed at the request of Puig's defence, the competence of the Spanish Supreme Court to know the merits of the case, and consequently its capacity to issue a EAW against Puig.

To begin with, the Court in Chambers relied on the information provided by the Public Prosecutor following a request for supplementary information sent to the Spanish authorities. The result of the inquiries, which included an official reply from a Spanish magistrate of the Spanish Supreme Court, were submitted to the Court in Chambers. In its findings, the Public Prosecutor noted that the assessment on the competence to issue a EAW by the Court in Chambers exceeded the limited discretion offered by the Belgian EAW Act (Article 4 of the Belgian EAW Act). This was an opinion the Belgian magistrate did not share. Despite noting that the assessment on the competence of issuing authorities was not explicitly mentioned in the FD EAW, the Court in

48 Court of Cassation, 17 November 2020, P.20.1127.N/1

49 Withdrawn on the 5 December 2017 by judge instructor LLarena investigative judge from the Spanish Supreme Court who took over the investigation and instruction of the case, issuing the following EAW against Puig and the other Catalan politicians on exile. Spanish Supreme Court, 5 December 2017, Diligencias Previas 82/2017.

50 Brussels Court in Chamber, Raadkamer, 18 May 2018. Puig Gordi. 2018/1011, The decision is not public.

51 Brussels Court in Chamber, Raadkamer, 7 August 2020. Puig Gordi .2019/1020, The decision is not public.

52 Brussels Court of Appeal, Kamer van Inbeschuldigingstelling (KI), 7 January 2021. Puig Gordi 2021/79, The decision is not public.

Chambers referred to the EU case law and stressed how the "CJEU had nevertheless raised the pleas from various courts and delivered binding rulings in this regard".[53] (Puig, Court in Chambers,2020, p.4/10)

The magistrate also recalled recitals 8 and 12 of the FD EAW with respect to i) the need for executing authorities to subject the EAW to sufficient controls (recital 8)[54] and ii) the possibility for a Member State to apply its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media in the context of the execution of an EAW (recital 12).[55] By reference to Article 2(3) of the Belgian EAW Act and in line with cited CJEU case law,[56] the Court in Chambers concluded that the assessment over the competence of the issuing authority was not only possible, but a duty of the executing authority when read together with the objectives contained in the preamble of the FD EAW (Puig, Court in Chambers,2020, p.4/10). In connection to this, the magistrate referred to Article 6(1) of the FD EAW[57] with regards to requisite that the issuing authority be competent to issue an EAW based on its national law.

Framing its assessment under the legal obligation to protect against fundamental rights violations, the magistrate recalled the ECtHR case of Claes et al v Belgium,[58] a case in which Belgium was condemned for a violation of Article 6(1) of the Convention. The applicants Mr. Claes and Mr. Coeme had contested the competence of the Belgian Court of Cassation to know the merits of the charges raised against them, provided that their competence was not explicitly granted by Belgian law. In Puig, citing Claes the Court in Chambers stated that "[the ECtHR] thus accepts with certainty, that there is a breach of Article 6 of the European Convention on Human Rights where a person suspected of having committed a crime is not judged before the pre-established and competent court" (Puig, Court in Chambers, 2020, p.5/10).[59] Having established the risk to the right of Puig if the EAW was executed, and embracing the documentation put forward by the defence, the Court in Chambers continued to assess whether the issuing authority was competent to issue the EAW.

II.2.2. Evaluating the (in)competence of the issuing authority [Puig, Brussels Court in Chambers, 7 August 2020]

To assess the competence of the issuing authority, the Court in Chambers framed its analysis under the "right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law" (Article 47(2) of the EU Charter).[60] The magistrate concluded that, in absence of specific legislation providing for the opposite, the competent authority to examine the allegations against Puig Gordi

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53 To justify its capacity to assess the issue, the KI referred to CJEU case law where the level of independence of judicial authorities and their competence to issue EAW was put to the fore namely: C-566/19 PPU, C-626/19 PPU, C-625/19 PPU and C627/19 PPU.

54 Recital (8) FD EAW: Decisions on the execution of the European arrest warrant must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender."

55 Recital (12) FD EAW: "This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

56 Ibid.19

57 Article 6(1) Belgian EAW Act: The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

58 Claes et al v Belgium (Requêtes nos 46825/99, 47132/99, 47502/99, 49010/99, 49104/99), ECHR [GC] 2005 49195/99 et 49716/99).

59 Brussels Dutch-speaking Council Chamber, Raadkamer, 7 August 2020. 2019/1020 (p.5/10).

60 Charter of Fundamental Rights of the European Union, 2012, Article 47(2)

had to be the one "determined by the location where the crime took place" (Puig, Court in Chambers, 2020, p.9/10)[61].

As a source for its assessment, the Court in Chambers relied on the conclusions of the Human Rights Council Working Group on Arbitrary Detention (UN WGAD) in its Opinion No. 6/2019[62] and Opinion No. 12/2019 [63]. Inter alia, the opinions rejected the competence of the Spanish Supreme Court to know the case derived from the organization of the Catalan referendum, stating that "the territorial, personal and material jurisdiction to investigate and adjudicate on possible criminal acts fell to the Catalan courts, since the offences were allegedly committed in Catalan territory by officials of the Catalan government and parliament." (Human Rights Council,2019, para. 121)[64]. In line with that, the Court in Chambers recalled the UN WGAD conclusion that the Supreme Court's jurisdiction over the case, was in violation of the right to a hearing before a competent court as provided for in article 10 of the Universal Declaration of Human Rights and article 14(1) of the ICCPR (Human Rights Council,2019, para.131-136)

Having cited the Spanish government's explanations over the nature of the judicial response against the organizers of the Catalan referendum,[65] the Court in Chambers highlighted the ordinary nature of the offences described in the EAW, which in its view, hindered any deviation from the jurisdictional rules set by the Spanish criminal procedure law.[66] Furthermore the Court stressed that the suggested competence of the Spanish Supreme Court, relied only on its own jurisprudence, without the same being established in any explicit legal provision. In that respect, the information provided by the judge of the Spanish Supreme Court[67], justified the competence of the supreme court based on the "rule of connexity"[68], which aimed to avoid a situation where judicial outcomes upon the same facts could lead to irreconcilable results. On that basis, the Supreme Court

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61 Brussels Dutch-speaking Council Chamber, Raadkamer, 7 August 2020. 2019/1020 (p. 9/10)

62 Human Rights Council Working Group on Arbitrary Detention, 13 June 2019, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019; Opinion No. 6/2019 concerning Jordi Cuixart I Navarro, Jordi Sánchez I Picanyol and Oriol Junqueras i Vies (Spain)

63 Human Rights Council Working Group on Arbitrary Detention, 10 July 2019, Opinions adopted by the Working Group on Arbitrary Detention at its eighty-fourth session, 24 April–3 May 2019; Opinion No. 12/2019 concerning Joaquín Forn I Chiariello, Josep Rull I Andreu, Raúl Romeva I Rueda and Dolores Bassa I Coll (Spain)

64 Human Rights Council Working Group on Arbitrary Detention Opinion No 12/2019 para.121 stated "In the present case, the Working Group was convinced that the territorial, personal and material jurisdiction to investigate and adjudicate on possible criminal acts fell to the Catalan courts, since the offences were allegedly committed in Catalan territory by officials of the Catalan government and parliament. In addition, the Working Group received credible information according to which the Catalan courts have heard complaints relating to the movement in favour of independence from Spain. Moreover, the Working Group was not convinced that the natural judge of the alleged offences in the present case is the courts that are currently hearing them."

65 Human Rights Council Working Group on Arbitrary Detention Opinion No 12/2019 [para.82]: "According to the Government, the legal action taken in this case cannot be viewed as a reaction to a legitimate political desire for Catalan independence, but rather as nothing other than a judicial measure imposed in response to specific acts performed outside the rule of law."

66 Brussels Dutch-speaking Court in Chamber, Raadkamer, 7 August 2020. Puig 2019/1020 (p.7/10). "The offences described in the European arrest warrant are of an ordinary law nature, so that it is difficult to see that there is any reason to deviate from the usual rules of jurisdiction provided for in Spanish criminal procedure law".

67 The content of the notes provided concerning the competence of the Spanish Supreme Court also emerged in the appeal judgment (KI, 2021,point 3.3.5).

68 The information provided by the judge argued that the Supreme Court had declared itself competent to know the case against the co-accused (in reference to the Catalan politicians and activists tried in Spain), including those, as in the case of Puig, who were prosecuted for "mala praxy" (in relation to the offence of embezzlement) on account of the fact that "these offences were closely related to accusation for the offence of sedition.

expanded the jurisdiction over the responsibilities of the Catalan politicians prosecuted in Spain, to also those located abroad and targeted by EAWs.

Again, by reference to Claes et al v Belgium,[69] the Court in Chambers challenged the Supreme Court's competence under the rule of connexity and by reference to recital 12(2) of the FD EAW, recalled the capacity of Member States to apply their constitutional rules in the context of the EAW proceedings. The Court in Chambers concluded its reasoning by invoking Article 13 of the Belgian Constitution according to which "No one can be separated, against his will, from the judge that the law has assigned to him". Provided that the Instructing Magistrate of the Spanish Supreme Court lacked jurisdiction to know the merits of the case it could not, considering the FD EAW, be regarded as a competent authority to issue an EAW against Puig. As a result, the Court in Chambers found that the essential precondition for the issuance of an EAW had been infringed (Article 6.1 FD EAW)) and the EAW was to be rejected.

II.2.3. Impartiality and independence of the issuing authority and the presumption of innocence of the accused [Puig, Brussels Court of Appeal, 7 January 2021]

The decision adopted by the Court in Chambers of Brussels refusing the EAW against Puig was examined on appeal by the KI of Brussels.[70] Again at the request of the defence, the KI addressed the Spanish Supreme Court's independence and impartiality through the assessment of Puig's right to a fair trial and presumption of innocence. When doing so, the KI rejected general critiques over the functioning of the Spanish justice, which according to the defence was "in part formed by judges politically designated" (KI, 2021, point 3.3.1).The KI questioned the reports and publications submitted by the defence to support such claim, insofar none provided a "specific link to the proceedings against Puig". While acknowledging the reliability of the UN WAGD report, the KI disqualified other evidentiary documentation provided by the defence arguing that "without prejudice of that established later on by the [UN WGAD report], the other cited publications [by the defence] cast doubts on the independence and impartiality of their authors and the reliability of the information provided" (KI, 2021,point 3.3.1) [71].

As the Court in Chambers had done, the KI also granted authority and reliability to the UN WGAD report and the arguments and conclusion therein presented. Far from questioning the Spanish system as a whole, the UN WGAD reports linked the issue on the impartiality and independence of the Spanish Supreme Court to the particular risk against the presumption of innocence of Catalan politicians. In particular, the KI embraced the conclusions of the UN WGAD report over the violation of the presumption innocence resulting from "statements of high rank officials upon the culpability of the persons concerned prior the adoption of a judicial decision" (KI,2021, point 3.3.5). In that respect, the UN WGAD had specified that "statements publicly condemning the accused persons before a sentence had been passed violated the presumption of innocence and constituted an undue interference that undermines the independence and impartiality of the court" (Human Rights Council,2019, para.123). The report recalled the "statements made by the Deputy Prime Minister of Spain, in which she congratulated the Prime Minister for successfully decapitating the Catalan pro-

[69] ECtHR, Claes v Belgium, 02 September 2005, no 46825/99, 47132199, 47502.199, 49010199, 49104199, 49195/99 and 49716199 and 'ECtHR, Coeme v Belgium, no 32492/96, 32547196, 32548196, 33209196 and 33210/96.

[70] Court of Appeal, Brussels, Kamer van Inbeschuldigingstelling (KI), 7 January 2021. n2021/79. The decision is not public.

[71] Brussels Court of Appeal, Kamer van Inbeschuldigingstelling (KI), 7 January. 2021. 2021/79, (point 3.3.1)

independence parties by arresting their leaders. Further statements were made by the Minister of the Interior, in which he referred to the leaders of the independence movement as reckless, dangerous rebels" (Human Rights Council, 2019, para.126).

In conclusion, although the KI rejected the allegations over the systematic or generalized lack of independence and impartiality of the Spanish judicial system, it acknowledged that in the specific prosecution of Catalan politicians, statements made by high rank officials could have an impact on their presumption of innocence.

II.2.4. The assessment of the defense's evidence and the further information from the issuing authority [Puig, KI, 2021].

Also on appeal, having concluded that the dual criminality requirement of article 5(1) of the Belgian EAW Act was met, the KI went on to the asses the existence of a concrete serious risk to the fundamental rights of Puig (KI, 2021, point 3). To that end the Court recalled article 4(5) of the Belgian EAW act and the obligation to refuse an EAW on fundamental rights grounds (Puig, KI, 2021, point 3.1).

Before addressing the substance of the matter, the KI recalled the provisions of the right to a fair trial and presumption of innocence established in Article 6 (1) and 6(2) of the European Convention on Human Rights and Article 47 of the EU Charter. Furthermore, the KI highlighted recital 12 of the FD EAW and the possibility for the executing authority to refuse an EAW issued for the purpose of prosecuting or punishing a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions, or sexual orientation.

As the Court in Chambers had done before, the KI embraced the conclusions of the UN WAGD in its Opinion No. 6/2019 on the proceedings against the Catalan politicians tried in Spain and who, together with Puig, had been identified by the Spanish authorities as promoters of the Catalan Referendum for Independence from October 2017 (Puig, KI,2021, point. 3.3.4).[72]

When assessing the relevance of the report, the KI made specific reference to *Aranyosi and Căldăraru* [73] and stated that "the information provided by the UN Working Group on Arbitrary detention lodged by the defense fulfilled the requisites of being objective, reliable, precise, and duly updated source" (KI,2021, point 3.3.4). The KI stressed that the content of the UN WGAD report resulted from "several sources" including the contributions from the Spanish Government.

The conclusions from the UN WGAD observed that: i) the right to a hearing by a competent and impartial tribunal, as recognized in article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant, was not observed and that ii) the presumption of innocence was violated, in light of the statements made by high-ranking State officials publicly implying a presumption of guilt before the decision of the Spanish Supreme Court and which possibly influenced how they were viewed by the Court. This had resulted in a breach

[72] After dismissing part of the documentation provided by the defense, the KI stated, "Notwithstanding the above, the Chamber has to take into account the report from the UN Working Group on Arbitrary Detention from the 27th of May 2019, presented by LLuis Puig i Gordi, among others, to the Spanish Permanent Delegation at the UN". (p.13/18)

[73] Judgment of the Court (Grand Chamber) of 5 April 2016 in Joined Cases C-404/15 and C-659/15 PPU, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, (para.89)

of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant (Human Rights Council,2019, para 134 and 135).[74]

On March 11, 2020, at the request of the prosecutor general of Brussels, a Spanish judge from the Spanish Supreme Court, offered further explanations on its competence to know the merits of the Puig case (KI, 2021, point 3.3.5). Nevertheless, the KI, mirrored the Court in Chamber's position with regards to Spanish authorities' arguments on the rule of connexity, and reasserted that the Spanish Supreme Court did not have competence to know the case of Puig. By reference to Claes et al v Belgium (para. 105 to 108) and to *Coeme v Belgium (*para 39 to 44) the magistrate again pointed at the condemnatory sentence against Belgium for a violation of Article 6(1) of the Convention.[75] The KI stressed that the competence of the Spanish Supreme Court, only relied on its own jurisprudence, without the same being established in any explicit legal provision. (KI,2021, point 3.3.5).[76]

With regard to risks on Puig's presumption of innocence, the KI considered valid the "strongly documented conclusions" from the UN WGAD report on the violation of the presumption of innocence of the Catalan politicians being tried in Spain by the Spanish Supreme Court. It referred to statements made prior the judgement by the Deputy Prime Minister of Spain and the Minister of Interior praising the prosecution of the Catalan leaders and declaring them "dangerous rebels". Thus, the KI disagreed with the position of the Spanish government qualifying those statements as being "irrelevant". In Spain's view there was a lack of "(…)evidence that those statements have had an influence on the decisions taken by the judicial branch" (Human Right Council, 2019, para.125). Furthermore, the UN WGAD report reminded the arbitrary attitude of the Spanish National High Court (Audiencia Nacional) when it came to admit and qualify certain facts of the case (Human Right Council 2019, para. 127).[77] Hence, despite the Spanish Government's position, the UN WGAD was persuaded that the right to the presumption of innocence of the Catalan politicians and activist had been violated[78]. In light of those observations, the KI concluded that "[t]he risk of violation of the presumption of innocence must be also strongly considered. The broadly documented conclusions by the UN WGAD, with regards to the case of the other three Catalan politicians, in relation to the statements made before the trial

[74] UN Working Group on Arbitrary Detention Opinion No. 6/2019 (para 134 and 135).

[75] ECtHR, Claes et al v Belgium, 02 September 2005, on 46825/99, 47132199, 47502.199, 49010199, 49104199, 49195/99 and 49716199 and ECtHR, Coeme v Belgium, 32492/96, 32547196, 32548196, 33209196 and 33210/96)

[76] The KI concluded: "Provided that, from one hand Puig Gordi was no parliamentary of any State parliament, and that he had, in principle, to be tried by a Catalan court, and from the other hand that based on the information received from Public Prosecutor's office, it is established that Spanish Supreme Court, has repeatedly declared itself competent to judge all the accused in light of the close connection between the offences charged to them, without there being an explicit legal basis to expand its competence over them, it is ascertained that, in this sense, there are founded reasons to believe that the execution of the EAW would undermine the fundamental rights of the person concerned (Puig), as it is established by article 6 of the TEU.".

[77] paragraph 127: Furthermore, the court of appeal of the National High Court stated that some facts ascribed to the defendants are common knowledge and do not need to be proved. For example, in the view of the court of appeal, it is a known fact that Mr. Cuixart stood on top of a national police vehicle on 20 September 2017. However, the Working Group received credible information according to which at that moment Mr. Cuixart and Mr. Sánchez were calling for the demonstration to come to a peaceful conclusion.

[78] UN Working Group on Arbitrary Detention Opinion No. 6/2019 para 128. "In the light of the statements made by high-ranking State officials publicly implying that the detainees should be presumed guilty, which could influence how they are viewed by the courts, the Working Group has been persuaded that the right to presumption of innocence of Mr. Cuixart, Mr. Sánchez and Mr. Junqueras has been violated, in breach of article 11 (1) of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

by high-rank officials and authorities on their culpability, are valid, among other thigs, due to the close relation between them and the acts being charged to Lluis Puig Gordi". (KI, 2021, point 3.3.5).

As a result, the KI upheld the decision of the Court in Chambers and invoked the mandatory ground of refusal enshrined in Article 4(5) of the Belgian EAW Act.

II.2.5. Contribution to the risk assessment tests in the context of EAWs [Puig, Court in Chambers, KI, 2021]

The case of Puig renders a novel contribution to the body of existing legal tests assessing the risks to the fundamental rights of a requested person as a ground to execute or reject an EAW. [79]

First, differently from the LM case, Belgian authorities did not rely on the existence of systemic deficiencies in the Spanish judiciary. As a matter of fact they dismissed such claim. The "risk in abstracto" was observed based on Puig's quality as a former member of the Catalan government. Thus the assessment went directly to challenge the independence and impartiality of the Spanish Supreme Court when ruling issues related to the Catalan referendum events. This approach escapes the Polish precedent and the arguments raised to apply the sanctioning mechanisms under Article 7 (1) Treaty of the European Union.

Second, unlike in the LM case, where the Irish executing authority highlighted the difficulties to establish a real risk of an unfair trial at the extradition stage proceedings, in Puig, Belgian authorities witnessed the unfolding of the proceedings taking place in Spain against Puig colleagues. Therefore the qualitative and anecdotical evidence available on the trials against Catalan politicians and civil activists, represented a good account on what could happen if Puig's EAW was executed. Having considered the personal situation of the requested person and the nature of the offence motivating the EAW, both the Court in Chamber and the KI reached the conclusion that a risk "in concreto" existed attempting Mr. Puig's right to stand a fair trial.

Third, the Puig case weights the practical value of the dialogue between authorities as required by article 15 (2) FD EAW. To evaluate the impact of a surrender, the Belgian authorities did request further information to their Spanish counterparts. However they did not agree on the rule of connexity as being a valid argument to justify the jurisdictional competence of the Supreme Court. The dialogue between authorities took place, but it was insufficient to convince the executing authority.

II.3. Mutual recognition and the executing authority's duty of procedural diligence (Valtonyc)

J.M.A, nicknamed Valtonyc is a 23-year-old rapper from Mallorca, sentenced in February 2017 by the National High Court of Spain (Audiencia Nacional) to 3.5 years of imprisonment for the lyrics of rap songs he released in 2012 and 2013, for the following offences: i. Defamation of members of the Spanish Royal Family (lese majesty) (1 year); ii. Glorification of terrorism and humiliation of victims of terrorism (2 years); iii. Threats (6 months). A first EAW was issued on 25 May 2018, and a second EAW on 27 June 2019 under the offence of 'terrorism', pursuant Article 2(2) of the FD EAW. By order of 17 September 2018, the Court in Chambers of Ghent, having

[79] CJEU, 25 July 2018, Case C-216/18 PPU, LM. For an analysis of this case see T. Wahl (2020) Refusal of European Arrest Warrants Due to Fair Trial Infringements. See also C. Bracken, 2018 Talk to me like Lawyers do – Celmer returns to the High Court of Ireland.

verified that the double criminality criteria were not met, rejected the EAW[80]. The decision was appealed by the public prosecutor, and the KI of Gent referred two questions for preliminary ruling to the CJEU. The CJEU in its ruling from 3 March 2020 backed up the position the Court in Chambers of Ghent.[81] The KI requested a preliminary ruling by the Belgian Constitutional Court over the compatibility of a Belgian Law from 1847 punishing offences against the King[82] and the limits of freedom of expression as enshrined in article 19 of the Belgian Constitution in conjunction with article 10 of the ECHR[83]. On 28 October 2021, the Belgian Constitutional Court declared that article 1 was unconstitutional for being incompatible with the protection of the freedom of expression according to the Belgian constitution and the ECHR.

II.3.1. Dual criminality and the meaning of terrorism in article 2(2) of the FD EAW [Valtonyc, Court of Chambers, 2018]

On 23 May 2018, Valtonyc fled Mallorca and moved to Belgium, two days later on 25 May 2018, the Spanish National High Court issued an EAW against him. To speed up his surrender a second EAW was issued on 27 June 2018. The new order clarified facts underlying the judgment of 21 February 2017 and framed the offence of glorification of terrorism under the offence of "terrorism" as listed in Article 2(2) of the FDE EAW.

The Court in Chambers identified the custodial sentence associated to the offence as the one in force on the date of the facts in the main proceedings, which provided for a custodial sentence for a maximum period of two years (Article 578 of the Spanish Penal Code).[84] As a result, it observed that the offences motivating the EAW did not reach the threshold of a minimum maximum of three years custodial sentence required to exclude the dual criminality verification (Article 5(2) Belgian EAW Act).

Once verified the charges against Valtonyc met the threshold of 12 months (Article 3 of the Belgian EAW Act), the examining magistrate moved to verify the dual criminality of the offences. As mentioned, in the EAW of 27 June 2018, the offence of glorification of terrorism was ticked boxed under the category of "terrorism" of article 2(2) FD EAW. In that respect, in its reasonings the Court in Chambers echoed the criticism over the utilization of list of offences in the EAW form without providing any reference to the specific offences involved in the case.[85] The magistrate complained that this practice forces the executing authority to blindly accept the qualification provided by the issuing authority "as it is" (Valtonyc, Court in Chambers, 2018, p.3/6).

Vested with its "marginal discretion", the magistrate verified whether the conduct described in the EAW against Valtonyc corresponded to that of terrorism under EU law. Taking into account the context in which the FD EAW was adopted, and making specific reference to the 9/11 events, the Court in Chambers argued that the term terrorism as provided in the list of article 2(2) of the FD EAW "mainly refers to international terrorism

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80 Ghent Court in Chambers, 17 September 2018, Valtonyc, N1569 P. 18/43. The decision is not public.

81 Court of Justice of the European Union, Judgment of 3 March 2020, X, C-717/18, EU:C:2020:142

82 Wet tot bestraffing van de beleedigingen aan den Koning 6 April 1847

83 J.A.B defence did not invoke the EU Charter.

84 Article 578 of the Spanish Penal Code

85 The Court in Chambers cites Holvoet & de Hert, 2014. Handboek internationaal en Europees Strafrecht, Antwerpen, Intersentia, 2014, 540p.

and not -as in the current case- to historical national terrorism" (Valtonyc, Court in Chambers, 2018, p.4/6). Consequently, the Court in Chambers proceeded to examine whether the offence of glorification of terrorism met the dual criminality requirement in article 5(2) of the Belgian Act.

Contrary to the position of the Public Prosecutor's Office and the Spanish authorities, in the eyes of the magistrate Valtonyc had not been convicted for incitement to commit terrorism under Spanish law (Article 579 (1) Spanish Penal Code). The Belgian executing authority argued that Spain had made an overly broad use of the term terrorism. In the views of the magistrate the glorification of terrorism had to be regarded as an "offence of opinion" and thus distinguished from the "general active terrorist offences themselves" (Valtonyc, Court in Chambers, 2018, p.5/6). A conclusion the Court in Chambers found "evident" not only from the description of the crime provided in section II of the EAW form (which identified the actual offences for which Valtonyc was sentenced) but also from the judgment itself and the supplementary note provided by the National High Court dating from 27 August 2018.

As a result, the Court in Chambers concluded that the issuing authority had wrongly identified the case of Valtonyc as terrorism under the FD EAW. Noting that the glorification of terrorism did not exist as a crime in Belgian law, and that the facts could not fall under the offence of incitement to terrorism, which did have an equivalent in Belgian law, the magistrate determined that the offences where not covered by dual criminality under Article 5(1) and Article 5(2) of the Belgian EAW Act.

Similarly, the double criminality exception was not met for any of other offences for which Valtonyc had been sentenced in Spain, on the 17 September 2018. As a result, the Court in Chambers rejected the execution of the EAW. [86] That same day the Public Prosecutor appealed the decision.

II.3.2. Dual criminality verifications and the formal limits of mutual recognition: custodial sentence thresholds [Valtonyc, Court of Chambers, 2018]

By judgment of 6 November 2018, the KI of Ghent declared admissible the appeal raised by the public prosecutor against the Court in Chambers decision. However, before entering to assess the case, it requested the preliminary ruling of the CJEU concerning practical aspects of the requirement of the minimum maximum three-year threshold indicated in Article 2(2) of the FD EAW.[87] The KI sought to clarify whether the executing authority was permitted to "recourse" to the criminal legislation applicable in the issuing Member State (1) on the date when the EAW was issued, or (2) the law applicable at the time when the acts were committed.[88]

[86] With regards to offence of defamation and serious offence to the Crown, the Court in Chambers found that the equivalent referred by the Spanish authorities namely article 327 et seq of the Belgian penal code, did not apply since it related to defamation and violence against ministers, members of the legislative chambers, holders of public authorities or public powers, and could thus not be applicable to the figure of the King (Title V, Chapter 11). On the offence of threats, the Court of first instance also dismissed the existence of double criminality, framing the facts under the artistic activity of Valtonyc as a writer and singer of lyrics.

[87] CJEU Judgment, X, 3 March 2020, Case C-717/18, EU:C:2020:142

[88] ibid

In the view of the KI, the capacity of the Court in Chambers to verify the dual criminality of the offences and thus refuse the execution of the EAW, was conditioned by the fulfilment (or not) of the maximum minimum custodial sentence required in Article 2(2) of the FD EAW and 5(2) of the Belgian EAW Act.

In that respect, in the version in force on the date of the facts the offence of glorification of terrorism (Article 578 of the Spanish Criminal Code) provided for a custodial sentence for a maximum period of two years. If that provision was taken as a reference to assess the custodial sentence threshold, the Court in Chambers would be entitled to verify the dual criminality. Alternatively, if the applicable custodial sentence had been the one in force in the Spanish Criminal Code at the date of issuing the EAW, the threshold of three years would have been met, and as a result, the Court in Chambers would have not been entitled to verify the double criminality of the acts and it could have not refused the execution of the EAW[89].

The CJEU ruled that "in order to ascertain whether the offence for which a EAW has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued"[90].

From the CJEU's decision it can be inferred the existence of an executing authority's "duty" to at least verify whether the requisites in Article 2(2) of the FD EAW are met with respect to the minimum maximum custodial sentence of three years, as it is defined in the law of the issuing Member State. Thus, it can be observed that mutual recognition does not turn the cooperation into purely mechanic exercise, even for those cases falling under the dual criminality exception. The executing authority must have a minimum diligence to check whether the information provided by the issuing authority is accurate.

II.3.3. The defamation of kings, freedom of speech and the Belgian Constitutional Court [Valtonyc, KI, 2020-2021]

Despite the reply given by the CJEU, the Public Prosecutor's appeal was still valid, among other reasons, because it claimed that the dual criminality was met for all the offences contained in the EAW**.** Therefore, the KI of Gent continued to examine whether the offences for which Valtonyc had been sentenced in Spain found an equivalent in Belgian Law.

The Court began by assessing the offence on defamation and serious insults to the Spanish Crown. The Public Prosecutor argued, contrary to the view of the Court in Chambers, that the same acts would be also punishable

[89] ibid para.14

[90] Ibid conclusion: (…)On those grounds, the Court (Grand Chamber) hereby rules: Article 2(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, in order to ascertain whether the offence for which a European arrest warrant has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the European arrest warrant was issued.

in Belgium under the Law of 6 April 1847 Punishing offenses against the King[91]. In light of it, the KI reached the conclusion that to assess the double criminality, it would need to make use of the Belgian Law of 6 April 1847 prosecuting crimes against the Crown.

In light of Article 26 (4) of the Special Law of 6 January 1989 on the Belgian Constitutional Court, the Court of Appeal asked the Constitutional Court for a preliminary ruling as follows: Does Article 1 of the Law of 6 April 1847 punishing offences against the King, criminalize, inter alia, insulting statements, shouts or threats to "the person of the King" expressed in public, infringe Article 19 of the Constitution in conjunction with Article 10 of the ECHR? (Valtonyc, KI, 2020, p.13/13).

On 28 October 2021, the Belgian Constitutional Court declared that article 1 was unconstitutional for being incompatible with the protection of the freedom of expression according to the Belgian constitution and the ECHR[92]. The Court concluded that article 1 " does not meet a compelling need and is disproportionate in relation to the objective of protecting the reputation of the King's person. (Point B.19).

At the time of writing, the case awaits the final decision of the Court of Appeal.

[91] Wet tot bestraffing van de beleedigingen aan den Koning 6 April 1847. Article 1 of the 1847 on the punishment of the King's oaths, the law provides that "anyone who, whether in public places or, by statements, shouts or threats, by any writings, printed matter, prints or phrases which have been struck, distributed or sold, put up for sale or in front of the public, shall be found guilty of insulting the person of the King, punishable by imprisonment of six months to three years and with a fine of EUR 300 to 3000."

[92] In its conclusions the Belgian Constitutional Court referred to ECtHR case law: 13 March 2018, Stern Taulats and Roura Capellera t. Spain, para. 41; ECtHR, 22 June 2010, Bingöl t. Turkey, para. 41; 15 March 2011, Otegi Mondragon t. Spain, para. 59

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in BELGIUM.

Subject to a case-by-case examination, the ground for refusal included in Article 4(5) of the Belgian EAW Law is used to qualify the principle of mutual recognition and the meaning of mutual trust . In that sense, Belgium's EAW cooperation is grounded on a critical trust. It welcomes the dialogue with the issuing Member State but also recognises the defendant's capacity to exercise an opposition to the surrender. As such, Belgium's limits to the principle of mutual trust, is decisively placed on the defence's capacity to challenge it at the eyes of the executing authority. As it has been observed, the scope of the verifications carried by Belgian executing authorities are strongly determined by the claims raised by the defence and the provision of evidence supporting such claims. When convinced on the existence of a potential risk over the rights of the requested persons, the executing authority considers its assessment not only possible but necessary in light of EU and Belgian constitutional law.

In the cases reported, the Belgian executing authorities relied on four types of sources to sustain their decisions: i. Documentation lodged by the defence; ii. The Public Prosecutor's assessment; iii. The supplementary information provided by the issuing authority, and; iv. The Court's own research on the matter. With regards to evidence supported by the defence, the executing authority assessed different sets of documentation based on elements such as: the impartiality, independence and the reliability of the information provided and its connection to the case under examination. With regards to the opinion of the public prosecutor and supplementary information from the issuing authority, Belgian magistrates did not hesitate to challenge them.

For the evaluation of the EAWs factual elements, Belgian executing authorities do not elude the political and historical circumstances surrounding the cases under assessment. While triggered by the defence action, the arguments developed by Belgian courts show how the context surrounding a case is evaluated to decide on the execution of a EAW. This critical approach has been often seen at odds with a system of judicial cooperation designed to "blindly" expedite extradition within the EU (See Leaf, 2004; Mitsilegas, 2012 and 2015).

In N.J.E the KI of Ghent rejected that the risk to the rights of the suspect had to reach any specific threshold of certainty to justify the refusal of an EAW. The case posed questions on the quantity, quality and source of the evidence used to assess the risks that justify the refusal of an EAW. The decision of the executing authority in the different instances of the N.J.E case shows the dynamic and contextual nature of Belgium's trust as an executing authority. If in 2013 and 2015 the assessment over risks to the rights of N.J.E led to the rejection of the EAW, in 2020 the same critical exercise did not provide sufficient reasons to refuse it.

In the Puig case, Belgian executing authorities checked the competence of the issuing authority in light of the right to fair trial. The magistrate's decision embraced the defence's claim on the incompetence of issuing's authority and the risk over Mr. Puig's right to a hearing by a competent and impartial tribunal. The further information provided by the issuing authority did not convince the executing authority. The Belgian courts also acknowledged that, in the specific prosecution of Catalan politicians, statements made by high rank officials upon the culpability of the persons concerned, affected the presumption of innocence of the requested person

and constituted an undue interference which undermined the independence and impartiality of the Spanish Supreme Court.

Finally, the Valtonyc case exposes the procedural obligation to double check the information contained in the EAWs forms. The executing authority must have a minimum diligence to ascertain whether the information provided by the issuing authority is accurate. In another level, the case also shows the relationship between dual criminality and the prevalence of the executing state's constitutional order when fundamental rights are at stake.

Often concealed behind the neutrality of juridical arguments, the cases of N.J.E, Puig and Valtonyc are acid tests for the principle of mutual trust and mutual recognition in EU extradition. The cases are examples how Belgium's mandatory ground for refusal on fundamental rights, operate in a very similar way to how political offence exceptions worked in former extradition treaties (Top, 2021). The almost 40 years separating the events in N.J.E from the Catalan referendum and the Valtonyc songs, are visible in the rights invoked for opposing each surrender: from the prohibition of torture to the right to fair trial, and freedom of speech. While the meaning of mutual trust and mutual recognition remains open to clarification, these cases contribute to explain key aspects about the limits of its Belgian interpretation.

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