INSIGHT

The Court of Justice and the Assessment of Double Criminality Under the European Arrest Warrant Framework Decision: *KL*

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ABSTRACT: The Court of Justice provided a comprehensive interpretation of the dual criminality requirement under Framework Decision 2002/584/JHA when it handed down its judgment in the *KL* judgment (case C-168/21 *Procureur général près la cour d'appel d'Angers* ECLI:EU:C:2022:558). The case at hand raised three intertwined legal issues. Firstly, whether the double criminality criterion is fulfilled where the relevant offences in the issuing and executing Member States aim at protecting different legal interests. Secondly, whether an accused person's refusal to surrender could be grounded on a partial lack of dual criminality. Lastly, whether the execution of a European Arrest Warrant may be denied in the event of a supervening disproportion of the penalty due to the said lack of double criminality. This *Insight* highlights how this ruling allows the executing authority significant flexibility when carrying out a double criminality check, with a view to minimising the applicability of the grounds for refusal in question. Comparing the *KL* judgment with the only existing precedent, it will be argued that the Court is increasingly oriented towards an abstract assessment of double criminality. A few final considerations will highlight the persistence of an effectiveness-oriented approach to mutual recognition and its exceptions.

KEYWORDS: judicial cooperation in criminal matters – European Arrest Warrant – double criminality – constitutive elements of a crime – fight against impunity - proportionality of criminal penalties.

I. Introduction

The *KL* case[1] provided the Court of Justice (Court) with a much-awaited occasion to lay down the first comprehensive interpretation of the dual criminality exception in the framework of the European Arrest Warrant (EAW) system.[2]

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[1] Case C-168/21 *Procureur général près la cour d'appel d'Angers* ECLI:EU:C:2022:558.

[2] In this respect, it is important to consider that the double criminality check had already been the subject of CJEU rulings. Nonetheless, the landmark judgment was delivered in *Grundza*, concerning the interpretation of the ground for refusal at issue in the context of FD 2008/909/JHA: case C-289/15 *Grundza*

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In particular, the judgment at hand concerns the interpretation of the double criminality requirement and corresponding grounds for refusing surrender, *as per* arts 2(4) and 4(1) of Framework Decision 2002/584/JHA (EAW FD),[3] in light of art. 49(3) of the EU Charter of Fundamental Rights (Charter or CFREU).[4]

Grundza and *A*[5] were the only precedents on this subject matter, so the Court of Justice has moved the stance by upholding a restrictive interpretation of these provisions, with a view to maximising the full effectiveness of the EAW system.

After briefly illustrating the case facts and Court arguments, the *Insight* analyses the part of the judgment concerning the possible relevance of a difference between the protected legal interests in a double criminality check.

A comparison between the corresponding part of the Court's reasoning in *Grundza* and the *A* case reveals that the similarity between the legal interests protected in the issuing and executing Member States, seemingly requested in *Grundza* for recognising double criminality, has lost all relevance.

Secondly, the *Insight* examines the Court's reasoning on the partial lack of double criminality and whether it amounts to grounds for refusal. It is contended that, by replying in the negative, the Court has widened the scope of the concept of 'constituent elements', as compared with the *Grundza* precedent. Finally, the *Insight* addresses the Court's restrictive stance on the possibility to refuse surrender on grounds that a partial lack of double criminality may determine a supervening disproportion of the penalty issued.

II. Facts of the case and preliminary questions

The case arose in France during the procedure for the execution of an EAW issued by the competent Italian judicial authority in order to enforce a prison sentence on Mr. KL by the Genoa Court of Appeals (the Italian judgment)[6]. Basically, a 12-year and six-month prison sentence resulted from accumulating sanctions for four different offences committed by Mr. KL during protests against the 2001 G8 summit.[7]

ECLI:EU:C:2017:4. As far as the EAW FD is concerned, arts 2(4) and 4(1) has only be interpreted by Order in respect of a very specific issue (see *infra*, section IV.1) in case *A*: case C-463/15 PPU *A* ECLI:EU:C:2015:634.

[3] Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[4] Charter of Fundamental Rights of the European Union [2012].

[5] It is important to consider that both precedents are different from the *KL* judgement, as will be illustrated *infra*: the former concerns the interpretation of double criminality pursuant to Framework Decision 2008/909/JHA, while the latter concerned the EAW FD but dealt with the specific issue of whether a minimum-penalty criterion may be added to the double criminality requirement.

[6] *Procureur général près la cour d'appel d'Angers* cit. paras 2, 10.

[7] To this respect, the case also raised remarkable attention among the general public. See for instance J Delage, 'Mandat d'arrêt européen contre l'italien Vincenzo Vecchi: «Ça serait donc ça, nos valeurs ?»' (5 October 2022) Libération www.liberation.fr.

Amongst those crimes, Mr. KL was convicted for 'devastation and looting', pursuant to art. 419 of the Italian Criminal Code (c.p., from the Italian *codice penale*).[8] The Italian judgment described the 'devastation and looting' offence as the sum of seven different acts, which were however considered as a single offence as they were part of the same criminal pattern.[9] The penalty handed down amounted to 10 years imprisonment for this composite offence.

A first refusal to surrender founded on procedural grounds[10] was annulled by the *Cour de Cassation*, so the case was referred back to the *Cour d'Appel d'Angers* indictment division (the indictment division). The latter denied surrender in respect of the aforementioned 'devastation and looting' offence, for failing to meet the double criminality requirement. This decision was impugned before the *Cour de Cassation* (the referring court or the referring judge), which eventually referred to the Court of Justice pursuant to art. 267 TFEU.[11]

The reference focused on three intertwined legal issues, giving rise to three preliminary questions.

The first question stemmed from a discrepancy between the French and Italian legal orders. The destruction, damaging and theft with damage to things are criminalized under French law.[12] However, the offence of 'devastation and looting' provided by art. 419 c.p. is not a mere sum of such acts, causing harm to property and its owners. On the contrary, the crime at hand corresponds to a set of massive and indiscriminate acts whose distinctive feature is to cause damage and destruction aimed at overtly threatening public order. The latter consists of the perceived sense of tranquility and security, or "the normal course of life in civil society".[13] Therefore, the referring court considered public peace to be *the legal interest protected* by art. 419 c.p., and noted that the defence of such an interest does not feature in the French legislation. Although acknowledging that the constituent elements of the offences involved is not relevant for the purposes of the dual criminality requirement under art. 2(4) EAW FD, the referring judge had doubts about whether such irrelevance still held true in the case before it, since it considered

[8] *Procureur général près la cour d'appel d'Angers* cit. paras 10-11.

[9] *Procureur général près la cour d'appel d'Angers* cit. para. 13. For a detailed description in English of Mr. KL's conduct, see case C-168/21, *Procureur général près la cour d'appel d'Angers* ECLI:EU:C:2022:246, opinion of AG Rantos, paras 12-13. At the time of writing, the judgment is not available in English.

[10] On the precise procedural reason, see *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 14.

[11] See *Procureur général près la cour d'appel d'Angers* cit. paras 16-19.

[12] *Procureur général près la cour d'appel d'Angers* cit. para. 23.

[13] In fact, the wording of art. 419 c.p. does not expressly mention the threat to public order as a constituent element of this offence; nonetheless, well-settled Italian case-law has inferred it from the collocation in the *Titolo V*, *Libro II* of the c.p., grouping crimes against the public order: F Antolisei, *Manuale di Diritto Penale. Parte Speciale – II* (16th ed., Giuffrè 2016) 141. The quotation in inverted commas is from *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 17.

that harm to public peace is an *essential* element of art. 419 c.p.[14] Therefore, the referring judge first queried whether surrender is allowed where the breach of a particular legal interest is a constituent element of the offence concerned by the EAW only in the issuing MS's legal order and not in the executing MS's one.

Secondly, the referring court noted that two of the seven acts included under the qualification of 'devastation and looting' would not be punishable under French law.[15] In addition, the Italian judgment unequivocally considered these two acts as inseparable from the other five. Therefore, the second preliminary question sought to ascertain whether this partial lack of dual criminality may amount to grounds for refusing surrender.[16]

Finally, the referring court raised proportionality concerns in light of art. 49(3) of the Charter. The *Cour de Cassation* acknowledged that assessing proportionality of the EAW is within the issuing authority's remit. Nonetheless, it highlighted that a *supervening* disproportion problem emerges[17] where acts punishable under executing Member State (MS) law are only a part of those which the EAW refers to. So, the third question concerned whether grounds for refusal may be inferred, in circumstances such as those at issue in the main proceedings, from art. 49(3) of the Charter.

III. The Court's response

In circumstances like those at issue in the main proceedings, the Court ruled that the dual criminality requirement and principle of proportionality of criminal offences and penalties do not justify a refusal to execute the EAW.

Firstly, it held that the difference between the legal interests protected by the two offences in the issuing and executing MSs is immaterial for the purposes of art. 2(4) EAW FD. Therefore, the ground for refusal laid down in art. 4(1) EAW FD does not apply. The Court recalled that the grounds for refusing surrender must be interpreted restrictively, because they constitute an exception to mutual-recognition.[18] Moreover, the Court stressed the importance of avoiding the grounds for refusal established in art. 4(1) EAW FD from neutralising or hindering the FD's objectives, namely to speed-up and smoothen

[14] *Procureur général près la cour d'appel d'Angers* cit. paras 21-22; 24.

[15] *Procureur général près la cour d'appel d'Angers* cit. para. 20. In particular, Mr. KL had been convicted for simply being close to a car and a bank building destroyed during the protests, without any (evidence of) active participation to the destructive conduct, contrary to what French law would require for him to bear criminal liability: on this detail, see *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 47.

[16] It is also important to note, in this regard, that the lack of double criminality has been transposed as a *mandatory* ground for refusal by the French legislature, so that no discretionary evaluation is left to the executing judicial authority: in this respect, see FG Ruiz Yamuza, 'CJEU Case Law on Double Criminality. The *Grundza-Piotrowski* Paradox?' (2019) ERA Forum 469.

[17] For the considerations relating to proportionality, see *Procureur général près la cour d'appel d'Angers* cit. paras 25-29.

[18] *Procureur général près la cour d'appel d'Angers* cit. paras 38-40.

judicial cooperation, as well as contrasting impunity.[19] As a consequence and considering the two provisions' wording, the Court stated that the double criminality assessment should be limited to verifying if the individual's *conduct* would constitute a crime *per se* if it had been committed in the executing MS's territory.[20] The Court then further underlined that requiring the same legal interests to be a constituent element of the offences in both MSs could result in refusing surrender being allowed where the person's conduct *does* constitute a criminal offence pursuant to the executing MS's law.[21]

The Court examined the second and third questions together. It held that arts 2(4) and 4(1) EAW FD do not permit refusing surrender where only some of the acts constituting a single offence would be punishable as a crime including in the executing MS, and clarified that such an interpretation is consistent with art. 49(3) of the Charter.

In fact, the Court reiterated that the constituent elements of an offence are immaterial for the purposes of the double criminality check under arts 2(4) and 4(1) EAW FD. It follows that whether the facts have been qualified as a single composite offence or multiple offences in the issuing MS is not relevant, either.[22] Furthermore, in the case at hand, denying surrender for the two acts not fulfilling the double criminality criterion would entail extending the refusal to the five acts which *do* constitute a crime including in the executing MS. This approach would unduly widen the scope of the grounds for refusal at hand.

The Court refrained from delving into a detailed examination of art. 49(3) of the Charter regarding the principle of proportionality of criminal offences and penalties, and simply recalled that only the issuing authority is called to ensure the rights of the person concerned are respected. It is therefore only for that authority to guarantee that the penalty issued is proportionate.[23] The Court noted that the alleged disproportion of the penalty is not enumerated amongst the grounds for refusal enshrined in arts 3, 4 and 4a EAW FD.[24] What is more, the double criminality assessment does not encompass any proportionality consideration.[25]

[19] *Procureur général près la cour d'appel d'Angers* cit. paras 43-47. Commenting on this point of the *KL* judgment, it has been observed that, in fact, "the fight against impunity [...] is stated nowhere in the FD": Fair Trials, 'Vincenzo Vecchi: When Mutual Trust and Cooperation Take Precedence over Respect for Fundamental Rights' (6 October 2022) Fair Trials www.fairtrials.org.

[20] *Procureur général près la cour d'appel d'Angers* cit. para. 36. In this regard, the Court expressly reiterated its previous judgment in case *Grundza*, dealing with the analogue provisions of FD 2008/909/JHA: *Grundza* cit.. The reference to FD 2008/909/JHA is: Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, arts 7(3) and 9(1)(d). As the AG stressed at paras 30-34 of his ppinion, the wording of these two provisions is perfectly equivalent to that of art. 2(4) and 4(1) EAW FD.

[21] *Procureur général près la cour d'appel d'Angers* cit. para. 48.

[22] *Procureur général près la cour d'appel d'Angers* cit. para. 55.

[23] *Procureur général près la cour d'appel d'Angers* cit. para. 65.

[24] *Procureur général près la cour d'appel d'Angers* cit. para. 66.

[25] *Procureur général près la cour d'appel d'Angers* cit. paras 67-68.

IV. *KL* v *Grundza*: stronger demand for flexibly assessing double criminality

IV.1. The irrelevance of a difference in the protected legal interest between the issuing and executing MS. Bringing *Grundza* and *A* a step forward

In *Grundza*, the Court ruled that if dual criminality were to be recognised, a certain degree of similarity – albeit not complete - should be established between the legal interests protected in the criminal legislations of the issuing and executing MSs.[26]

The extent of the requested similarity between the protected legal interests had already been questioned in the *A* case. Here the Court had held that arts 2(4) and 4(1) EAW FD prevent MSs from refusing surrender in respect of an act which *does* constitute a crime in the executing MS, on the grounds that it is punished by a maximum penalty of less than one year.[27] In so doing, the Court did not allow MSs to automatically exclude, for instance, that an offence punished in the executing MS by a fine could protect a similar interest as the crime sanctioned in the issuing MS by several years' imprisonment.[28] Therefore, *A* marginalised the role of such a similarity for the purposes of establishing double criminality.

KL builds on this precedent and deprives this criterion of any – albeit marginal – relevance. In fact, although referring to *Grundza*, the Court did not reiterate any reference to the degree of similarity of the offences in question. It ruled that dual criminality does not require an exact correspondence between the constituent elements of the crime in the two MSs involved, and in particular between the legal interests it seeks to protect according to the two different legislations.[29] Instead, it would be "necessary and sufficient" that *the acts* at the basis of the EAW be subject to a criminal sanction in the two States involved.[30] Admittedly, such a requirement would be satisfied in the Mr. *KL* case, since art. 419 cp. *also* aims at protecting the economic interests of the owners of the destroyed property, which are the same interests protected by the relevant French provisions.[31] However, the Court decided to be more incisive and omit recalling this further criterion.

[26] *Grundza* cit. para. 49. See also *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos cit. para. 43.

[27] *A* cit. paras 23-31. See, in this respect, M Bargis, 'Personal Freedom and Surrender' in RE Kostoris (ed), *Handbook of European Criminal Procedure* (Springer 2018) 320.

[28] In this respect, see FG Ruiz Yamuza, 'CJEU Case Law on Double Criminality. The *Grundza-Piotrowski* Paradox?' cit. 474: the Author notes, as a consequence, that the criterion of the similar legal interest protected shall be interpreted in a "generous and flexible" manner.

[29] *Procureur général près la cour d'appel d'Angers* cit. para. 45.

[30] *Procureur général près la cour d'appel d'Angers* cit. para. 34.

[31] *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 43.

IV.2. The irrelevance of a partial lack of double criminality. Towards a flexible, *prima facie* appraisal of the facts

The irrelevance of the constituent elements of the offence under art. 2(4) was also central to the response to the second preliminary question. It focused on whether a partial lack of double criminality justifies a refusal to surrender where a composite offence is in question in the legal order of the issuing State.

Two intermediate options were brought before the Court besides straight affirmative or negative answers. Firstly, the referring judge suggested conditioning surrender upon the severability of the sentence under the issuing MS's legislation. Secondly, according to the European Commission, the executing authority should consult the issuing one under art. 15(2) EAW FD, in order to ascertain whether the sentence could be divided. If this is possible, the issuing authority should issue a new EAW, referring to the sole *acts* fulfilling double criminality. Otherwise, the executing authority should carry out a balancing exercise between the imperative to avoid impunity and the actual weight of the acts satisfying double criminality, i.e. whether they are important or marginal as compared to the others.[32]

However, the Court did not address the issue of possible severability of the sentence, and simply ruled that a *partial* lack of dual criminality does not constitute grounds for refusal under art. 4(1) EAW FD. It held that the qualification of the facts concerned by the EAW as a single offence is immaterial for assessing double criminality.[33] This argument echoed the AG's opinion implicitly, where he had expressly stated that "there does not have to be an exact match between the *constituent elements* [...]. Accordingly, [art. 2(4) EAW FD] does not require that *all of the acts* constituting a single offence [...] constitute an offence in the executing State".[34]

Consequently, it is worth noting an important difference in the legal arguments used by the Court during its precedents. In *Grundza*, the Court had emphasised the non-necessity of "an exact match between the constituent elements of the offence, *as defined in the law* of [the two MSs involved]".[35] The Court's approach was therefore focused on the *abstract* features of the act giving rise to criminal punishment, as they were described in the relevant national legislation.[36] The Court broadened the notion of 'constituent elements' in *KL*, encompassing the *concrete acts* subsumed in that abstract definition in the concrete case. In other words, in *KL*, the Court did not limit itself to considering if dual criminality could be recognised if all Mr. KL's acts were punishable in France, but regardless of whether they are described as destruction causing economic harm or devastation threatening public peace.

[32] On the Commission's observations submitted on this point, see *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 65.

[33] *Procureur général près la cour d'appel d'Angers* cit. para. 55.

[34] *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 54 (emphasis added).

[35] *Grundza* cit. paras 35 and 37 (emphasis added).

[36] Which is how the constituent elements of the offence are commonly understood theoretically: see, for instance, case C-514/17 *Sut* ECLI:EU:C:2018:672, opinion of AG Bot, paras 67-68.

The Court went so far as to deem dual criminality satisfied even though two of those seven acts were *totally lawful* under French criminal law. It follows that, if the *single* offence of 'devastation and looting' had only comprised those two acts in the case at hand, it would have been possible for the French authority to refuse surrender, since the whole conduct would have lacked double criminality. Still, the fact that the other five acts were grouped under *the same, single* offence made refusal impossible under arts 2(4) and 4(1) EAW FD.

Summing up then, since a difference between the constituent elements of the offence does not amount to a lack of double criminality, the broader the concept of 'constituent elements' the fewer the possibilities for refusing surrender on that ground.

These considerations highlight that the Court advocated for a very flexible check of the double criminality of the acts. Consequently, *KL* may be understood as an extreme version of the *in abstracto* assessment of double criminality elaborated by scholars.[37] This is where the check must be limited to establishing if the type of conduct in question is qualified as criminal in the law of the executing MS.[38] If the relevant facts are *prima facie* liable to criminal punishment in the executing MS, the dual criminality criterion is met. So, the grounds for refusal established in arts 2(4) and 4(1) EAW FD would only avoid surrender *vis à vis* acts which are totally unrelated to criminal law in the executing MS.[39]

IV.3. The marginal role of the principle of proportionality of penalties

The Court only devoted a few final considerations to proportionality, with a view to confirming that the approach adopted regarding double criminality is also consistent with

[37] For the sake of completeness, it shall be pointed out that scholars commonly put forward the alternative between assessing dual criminality *in abstracto* and *in concreto*. Various, slightly different definitions of these two concepts have been proposed: by way of example, see those enumerated by A Falkiewicz, 'The Double Criminality Requirement in the Area of Freedom, Security and Justice – Reflections in Light of the European Court of Justice Judgment of 11 January 2017, C-289/15, Criminal Proceedings against Jozef Grundza' (2017) European Criminal Law Review 261; the Author is of the view that only an *in abstracto* assessment would be coherent with the mutual recognition principle. This latter opinion is also shared by L Bachmaier, 'European Arrest Warrant, Double Criminality and Mutual Recognition: A Much Debated Case' (2018) European Criminal Law Review 157-159, where the Author criticises the in-depth assessment commonly carried out by German courts as being in breach of arts 67 and 82 TFEU.

[38] On the contrary, a check *in concreto* has been conceptualized as requiring a thorough appraisal of the specific facts of each case, including all the relevant circumstances and the possible causes for excluding criminal liability. See, *inter alia*, FG Ruiz Yamuza, 'CJEU Case Law on Double Criminality. The *Grundza-Piotrowski* Paradox?' cit. 468. This Author summarises the difference as follows: "[c]omparison *in abstracto* refers to behaviour considered *a priori* whereas comparison *in concreto* relates to facts that have taken place". In this respect, it must be noted that the Court expressly excluded, in the *Grundza* case, the necessity to refer to such a dichotomy in its jurisprudence. See *Grundza* cit. para. 25.

[39] According to some Authors, the '"help' nature" of the EAW imposes such a 'watered down' check of dual criminality, which may justify refusal to surrender in respect of conduct which "could in no way be considered criminal under the law of the executing State": A Nieto Martín, 'The Foundations of Mutual Recognition and the Meaning of Dual Criminality' (2018) European Criminal Law Review 164.

art. 49(3) of the Charter. The Court recalled that an alleged disproportion of the penalty which the EAW refers to does not feature in the FD's exhaustive list of grounds for refusal. In addition, it reiterated that ensuring the proportionality of the sanction imposed by the issuing MS is exclusively for the issuing authority.

At the same time, the Court did not address the specific concern which the referring judge raised, namely the *supervening* disproportion emerging in circumstances such as those of Mr. KL's proceedings. As the *Cour de Cassation* underlined in such circumstances, no problem in terms of proportionality existed at the time of issuing the EAW, when the issuing authority carried out its checks. Such an issue only *emerged* at a later stage, namely during the execution phase, where the only authority which would be in the position to perform a (new) proportionality examination is the *executing* one.[40] In such a situation, the fact that the penalty no longer appears commensurate to the seriousness of the offence,[41] directly stems from the partial lack of double incrimination. Nonetheless, the Court excluded that the dual criminality check could encompass an examination of the proportionate character of the sanction, even in cases where the two issues are strictly intertwined.[42]

It is also worth remembering that scholars frequently discuss the role of the principle of proportionality regarding the EAW system.[43] Nonetheless, the principle at hand has various facets. Firstly, soft-law documents like the European Commission's Handbook of 2017 recommend the issuing authority carry out a proportionality-check before issuing EAWs[44]. So, the principle of proportionality is invoked with a view to avoiding the recourse to the surrender *mechanism* for merely petty offences, even when they meet penalty thresholds set forth in art. 2(1) EAW FD.[45] From a slightly different perspective, the proportionality of issuing an EAW deals with the evaluation of all exculpatory and incriminatory evidence, and shall be evaluated by the competent authority independently.[46] Finally, a completely distinct issue is whether the penalty imposed for the offence referred to in the EAW is proportionate to the seriousness of that crime.[47]

[40] In this regard, see *Procureur général près la cour d'appel d'Angers* cit. para. 28.

[41] See, in this regard, *inter alia*: case C-537/16 *Garlsson Real Estate and others* ECLI:EU:C:2018:193 para. 56.

[42] *Procureur général près la cour d'appel d'Angers* cit. paras 67-68.

[43] On the role of art 49(3) of the Charter in the EAW system, see *inter alia* V Mitsilegas, *EU Criminal Law after Lisbon* (Hart Publishing 2016) 142-156. As far as proportionality under art. 52(1) TFEU is concerned, in the limitation of the right to liberty, see L Mancano, 'Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality' (2018) Maastricht Journal of European and Comparative Law 718–732.

[44] See Commission Notice - Handbook on how to issue and execute a European arrest warrant of 6 October 2017, section 2.4. "Proportionality". See also *inter alia* V Mitsilegas, *EU Criminal Law after Lisbon* cit. 145, referring to previous soft-law acts of the European Commission.

[45] *Ibidem*. As far as art. 2(1) is concerned, the provision reads "[a] European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months".

[46] *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 61.

[47] As is prescribed by Art. 49(3): see in this regard *Garlsson Real Estate and others* cit. para. 28.

In light of the above, it is important to note that the concerns raised by the referring court were undoubtedly referred to "the proportionality of the penalty for which surrender is requested".[48] However, while illustrating the *Cour de Cassation*'s observations, the Court of Justice mentioned that a partial lack of dual criminality could lead to a supervening disproportion *of the EAW*.[49] Still, while answering that question, the Court made reference again to the impossibility of refusing surrender on grounds of an alleged proportionate character *of the sanction*. So, the various nuances of proportionality partially overlapped in the Court's reasoning.

Be that as it may, the case raised the crucial question as to whether implicit grounds for refusal could be inferred from art. 49(3) of the Charter.[50] By answering negatively straight away, the *KL* judgment clarified that the executing authority had no power to examine the proportionality of the penalty imposed in the issuing MS. Consequently, a parallel may be drawn between *KL* and the Court's reasoning in the *Advocaten voor de Wereld* case. Famously, the latter judgment dealt *inter alia* with the EAW FD's compliance with the principle of legality of criminal offences and penalties, also enshrined in art. 49 of the Charter.[51] In that judgement, the Court held that respect for the principle at issue in the EAW system is sufficiently ensured by the fact that the legal order of the issuing MS is consistent with it. So, in the same manner, the other principle laid down in art. 49(3), i.e. the proportionality of offences and penalties, is guaranteed by assessing the facts of the case by the judge in the issuing MS, and their consequent calculation of the penalty. Nevertheless, the Court did not seemingly factor in the direct effect attributed to the proportionality of sanctions in the recent *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Effet direct)* ruling.[52] The Court considered that this principle equates to prohibiting the adoption of disproportionate penalties, thereby being sufficiently clear, precise and unconditional to producing direct effects.[53] The judgement referred to the proportionality criterion as established in a Directive requiring for effective, proportionate and dissuasive sanctions,[54] but it expressly recalled that the adoption of disproportionate sanctions is

[48] See Court of Cassation judgment of 26 January 2021, para. 67, referring to "*la proportionnalité de la peine pour laquelle la remise est sollicitée*".

[49] *Procureur général près la cour d'appel d'Angers* cit. para. 28.

[50] As is mentioned by V Mitsilegas, *EU Criminal Law after Lisbon* cit. 144, such a possibility was merely addressed by AG Sharpston in case *Radu*, but as an *obiter dictum* in purely hypothetical terms: case C-396/11 *Radu* ECLI:EU:C:2012:648, opinion of AG Shartpston, para. 103.

[51] Case C-303/05 *Advocaten voor de Wereld* ECLI:EU:C:2007:261. For the sake of precision, it should be recalled that the judgment at issue concerned the removal of the double criminality check under art. 2(2) EAW FD.

[52] Case C-205/20 *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Effet direct)* ECLI:EU:C:2022:168.

[53] *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Effet direct)* cit. paras 17-32.

[54] Namely Directive Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'). The Directive reproduces the so-called Greek Maize criteria, named after case 68/88 *Commission v Greece* ECLI:EU:C:1989:339.

forbidden by art. 49(3) of the Charter[55] when penalties are criminal in nature. If the same reasoning were applied by analogy to the EAW system, the Court might have deemed the executing authority not only allowed, but in fact *forced* to refuse surrender when a plainly disproportionate penalty is in question.

The judgment at hand confirmed the *Melloni* precedent, whereby the level of fundamental rights protection to be ensured in EAW proceedings is the one resulting from the FD, and in particular by the grounds for refusal exhaustively enshrined therein,[56] so that higher guarantees may apply only if they do not hamper the FD's objective of fighting impunity.[57]

Finally, the *KL* judgment appears coherent with the Court's current case-law related to art. 1(3) of the EAW FD.[58] In fact, it has been so far consistently held that this provision may only found a refusal to surrender where the (alleged) breach of the fundamental rights of the person concerned derives from structural, generalised shortcomings.[59] Therefore, as the AG expressly suggested, the Court did not consider that jurisprudence was relevant in the *KL* case.[60] Nonetheless, at least two pending cases raise the issue of whether the requirement of a systemic problem may be derogated from in the event that it is only the specific, individual circumstances which may lead to a fundamental rights breach.[61] In particular, one of them concerns the possibility of refusing to execute an EAW on grounds of serious health issues affecting the person concerned.[62] This latter case presents a substantial analogy with *KL*, since personal health conditions and the *quantum* of penalty issued in a specific case are both characterised by a strictly personal character.

Admittedly, in his recently issued Opinion, Advocate General (AG) Campos Sánchez Bordona suggested merely postponing surrender under art. 23(4) EAW FD, instead of construing a true ground for refusal.[63] Nonetheless, the AG recognized that, if art. 23(4) or another EAW FD provision had not been applicable, the creation of a new ground for refusal would have been possible.[64] This would be precisely the case of the (supervening) disproportion of the penalty imposed, which is not addressed by any EAW FD article. In addition, it is worth

[55] *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Effet direct)* cit. para 31.

[56] Case C-399/11 *Melloni* ECLI:EU:C:2013:107.

[57] In this respect, about *Melloni* see L Mancano, 'Mutual Recognition in Criminal Matters, Deprivation of Liberty and the Principle of Proportionality' cit. 727.

[58] Which reads "[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

[59] The reference is to the famous line of cases commencing with the *Aranyosi* judgment: joined cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[60] *Procureur général près la cour d'appel d'Angers*, opinion of AG Rantos, cit. para. 64.

[61] Case C-158/21 *Puig Gordi and Others* pending; Case C-699/21 *E.D.L. (Motif de refus fondé sur la maladie)* pending.

[62] *E.D.L. (Motif de refus fondé sur la maladie)* cit.

[63] See case C-699/21 *E.D.L.* (*Motif de refus fondé sur la maladie*) ECLI:EU:C:2022:955, opinion of AG Campos Sánchez-Bordona, paras 60-97.

[64] *E.D.L. (Motif de refus fondé sur la maladie)*, opinion of AG Campos Sánchez-Bordona cit., para. 78.

mentioning that the Commission has suggested at the hearing of the E.D.L. case that that the sole individual circumstances may lead to a justified denial to surrender, with no need for an underlying structural problem, in the event that the strictly individual nature of the problem so requires. Therefore, should the Court opt for this latter new, fundamental rights-oriented approach in this pending case, there might be room for future reconsiderations of the relevance of art. 49(3) of the Charter, especially in the event of clearly disproportionate measures.

V. Concluding remarks

The judgment at hand is particularly relevant, as it provides the first comprehensive interpretation of the double criminality requirement in the EAW FD framework.

As was observed above, the judgment reveals the Court's persistent tendency to construe mutual recognition, at least in the EAW framework, as a principle primarily serving the law-enforcement and security needs of the issuing MS.[65] During the judgment, the Court repeatedly stressed the need to foster mutual recognition by interpreting the grounds for refusal restrictively. In so doing, the Court afforded particular weight to the FD's aim to render the fight against impunity more effective. Consequently - and in order to corroborate the importance of a flexible approach to double criminality - the Court stressed that this requirement would rarely be satisfied if assessed too rigorously, in light of the minimal degree of harmonization characterising EU substantive criminal law.[66]

While waiting for further developments regarding Mr. KL's surrender procedures, at least three questions remain open.

Firstly, it will be interesting to see whether the Court maintains the similarity between the protected interests in its future jurisprudence concerning the transfer of prisoners under FD 2008/909/JHA where no risk of impunity is at stake - unlike in the EAW. It will also be interesting to see whether that similarity will be construed as a true limitation to mutual recognition, or a mere statement of principles.

Secondly, it will be interesting to discover whether a closer equivalence between the offences would be required concerning crimes which have been the subject of harmonisation at EU level.

Finally, future cases might shed some light on whether a *partial* lack of dual criminality would allow for refusal or not, even where the acts that do not meet that criterion make up most of the single composite offence, or they have a qualitatively determining weight.

[65] For a comprehensive analysis of the evolution of the role played by the principle of mutual recognition in the interpretation of the EAW FD, see *inter alia* P Caeiro, S Fidalgo and JP Rodrigues, 'The Evolving Notion of Mutual Recognition in the CJEU's Case Law on Detention' (2018) Maastricht Journal of European and Comparative Law 689–703. Amongst the various examples of a persistent security-oriented approach, see for instance Case C-414/20 PPU *MM* ECLI:EU:C:2021:4 paras 75-82.

[66] *Procureur général près la cour d'appel d'Angers* cit. para. 46.