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ARTICLE

CJEU case law on double criminality. The *Grundza-Piotrowski* paradox?

Some notes regarding the *Puigdemont* case

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Abstract The implementation of the requirement of double criminality in the European Arrest Warrant Framework Decision is one of the fields where the strength of the principle of mutual recognition in criminal matters is put to the test.

There are differences between the transposition modalities of the different Member States and diverse interpretations in the case law of the European Court of Justice (CJEU) regarding the need for dual criminality. These circumstances may lead to problematic situations as has recently been highlighted in the wake of the request for extradition of Mr Puigdemont to Spain from Germany.

These factors are analysed in light of CJEU jurisprudence (chiefly the *Grundza* and *Piotrowski* judgments) applying Articles 2(4) and 4(1) of the EAW Framework Decision and the German transposition legislation, IRG.

Keywords Double criminality · EAW · CJEU · *Puigdemont* case

1 The EAW as an exponent of the model of judicial cooperation in criminal matters based on mutual recognition

The Puigdemont affair has once again raised public awareness, especially in Spain, about the debate concerning the EAW's efficiency, causing perplexity that it was not possible to obtain the collaboration of another EU Member State to extradite the former President of the Generalitat of Catalonia on a count of rebellion.

The so-called '*caso procés*' which has followed against a series of Catalan political leaders for the alleged crimes of rebellion, disobedience and embezzlement of public

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funds has been brought before the Supreme Court of Spain, with the trial expected to commence in early 2019.[1] In the proceedings, the Supreme Court of Spain issued an EAW against Carles Puigdemont, former President of the Generalitat of Catalonia, on 21 March, 2018. Mr Puigdemont was arrested in Germany, where the Schleswig-Holstein Court finally rejected extraditing him to Spain in July 2018.

The premises leading to controversy over the usefulness of the EAW spin around two axes: first, the concept and nature of the criminal judicial cooperation system based on mutual recognition; and second, the dynamics of its application in the EU and the Member States themselves. These two keys will guide us in the study of double criminality concerning Article 2(4) and Article 4(1) of the EAW Framework Decision[2] in the light of the jurisprudence of the CJEU.

According to Article 67 of the Treaty on the Functioning of the European Union[3] (TFEU), the Union constitutes an Area of Freedom, Security and Justice (AFSJ), which regarding judicial cooperation is developed along two strategical lines: legislative harmonisation and the adoption of the model of mutual recognition of resolutions.

The Tampere Council[4] enshrined cooperation based on mutual recognition as the 'cornerstone' of the system, covering practically all types of judicial criminal cooperation in the European Union.

The application of the principle of mutual recognition (whose adoption entailed a series of constitutional implications as Mitsilegas[5] reminds us) does not imply that the execution of a request for cooperation from another Member State will be carried out as if it were a request from a national court. No such equivalence can be drawn, and the request for cooperation can be denied for different reasons which reflect what has been described as a tension between a broad and restricted conception of cooperation.

The broad conception is based on the principles of equivalence and trust. According to the first, it is presumed that the decisions of a foreign court would be compared to those of a national court. Under the principle of trust, it is supposed that the State from which the request for cooperation originates participates in a common legal *acquis*, with procedural rules and a framework of respect for comparable human rights.

The restricted conception of cooperation maintains that the application of mutual recognition instruments is conditioned in three ways. First, by the observance of the requirements of the so-called European public order,[6] mainly rights recognised in the

[1] Special Proceedings no. 20907/2017. The most important Supreme Court decisions are available in the jurisprudence search engine of the website of the General Council of the Judiciary of Spain (CENDOJ): http://www.poderjudicial.es/search/indexAN.jsp.

[2] Council Framework Decision 2002/584/JHA of 13 of June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

[3] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2012] OJ C 326/1.

[4] Tampere European Council, 15–16 October 1999. Presidency Conclusions, conclusion no. 37, available at: http://www.europarl.europa.eu/summits/tam_en.htm.

[5] 5 *Mitsilegas* [19], pp. 1277–1311.

[6] On the notion of European Public Order see *De Lange* [7].

European Convention of Human Rights[7] (ECHR) and the Charter of Fundamental Rights of the European Union[8] (CFREU). Second, because of the need to reconcile penal frameworks that are not sufficiently harmonised. And third, by the systems of procedural guarantees of each Member State. To these conditions is added the reluctance of the States to yield sovereignty in a matter as sensitive as extradition.

The debate mentioned above leans in favour of the restricted conception of mutual recognition, despite the advances regarding legislative harmonisation, and the homogenisation of procedural rights in the Union, in accordance with Article 82(2)(b) and (d) of the TFEU, and the roadmap of the Council,[9] with successive Directives having been promulgated in this regard.

In this context, the importance of the EAW is crucial, being as it is the first Framework Decision of the mutual recognition system and, by its very nature, the instrument that, together with Framework Decision 2008/909 on the transfer of sentenced persons,[10] deals with extradition, an area in which States are more reluctant to yield their sovereignty.

The design of the EAW corresponds to the restricted conception previously alluded to. The grounds for refusal Articles 3 and 4 of the EAW Framework Decision, although apparently limited, offer a wide interpretation margin, which together with the additional guarantees of Article 5 places us not far from the traditional extradition system. In the same way, the possibility of extraditing nationals has its counterpoint in Articles 4(6) and 5(3); the principles of territoriality and national jurisdiction continue in force; the short deadlines for processing applications (involving a 60 day maximum according to Article 17(3)) are sometimes compromised by appeals with suspensive effect (the validity of which was established by the CJEU in the *Jeremy F./Premier ministre* case)[11] which delay proceedings—as shown in the famous examples of *Melloni*[12] and *Assange*[13] which took years to be resolved.

On the other hand, the jurisprudence of the CJEU highlights the importance of Article 1(3) of the EAW Framework Decision, confirming that fundamental rights cannot be affected by the application of the instrument, as Klip[14] has noted in his analysis of the relationship between fundamental rights and mutual recognition and as was recently brought to light in the *Aranyosi-Caldararu*[15] and *LM*[16] cases.

[7] Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.11.1950, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[8] Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/02.

[9] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings [2009] OJ C 295/1.

[10] Council 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 [2008] OJ L/327/27.

[11] Case C-168/13 *Jeremy F./Premier ministre*, EU:C:2013:358.

[12] Case C-399/11 *Melloni*, EU:C:2013:107.

[13] *Julian Assange v The Swedish Prosecution* [2011] EWHC Admin 2849.

[14] *Klip* [14], p. 362.

[15] Joined Cases C-404/15 and 659/15 *Aranyosi-Caldararu*, EU:C:2016:198.

[16] Case C-216/18 *LM*, EU:C:2018:586.

2 The double criminality in the EAW Framework Decision. Articles 2(4) and 4(1) and their transposition[17]

Double criminality has to do with the correlation that exists in the way criminal law has categorised a form of behaviour in two States which are involved in an extradition process. It can be studied *in abstracto*, comparing the laws of requesting and requested State, to check whether the behaviour is classified in both of them as a crime. However, it also can be assessed *in concreto*, with complete verification of matter and personal identities and appreciation of all concurrent circumstances, leading to the conclusion that the act would be a crime in both States. (See in this respect De Bondt and Platcha,[18] among others.) Comparison *in abstracto* refers to behaviour considered *a priori* whereas comparison *in concreto* relates to facts that have taken place.

Falkiewicz[19] provides a very interesting nuance of differentiation between the substantive and procedural aspects of double criminality. The first concerns the *lex loci*, or the verification in the place where the act was committed (the requesting State) that such action is constitutive of a crime. The second concerns the *lex fori*, or the verification of whether, if the same action had been committed in the place where correspondence is to be assessed (the requested State) it would be regarded as amounting to a crime as well.

The EAW Framework Decision introduced two significant advances in this regard.

First, its Article 2(2) sets out a list of thirty-two offences excluded from the control of double criminalisation, a transcendental innovation, whose compatibility with Article 6(2) of the Treaty on European Union[20] was declared in the *Advocaten vor deer Wereld*[21] case.

Secondly, it relegates the absence of double criminality to an optional ground for refusal, which in turn may cause some problems derived from the transposition models, as we will see below.

As for offences not included in its Article 2(2), Article 2(4) of the EAW Framework Decision establishes that '[...] the surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.'

Moreover, Article 4(1) sets out as a ground for optional refusal of surrender—the assumption that in some of the cases in Article 2(4) of the EAW Framework Decision '[...] the act on which the European arrest warrant is based does not constitute an offence under the law of the executing Member State [...]' with the exceptions set out in Article 4(1) of the EAW Framework Decision in relation to taxes or duties, customs and exchange. 'For those, the execution of the EAW shall not be refused on the ground that the law of the executing Member State does not impose the same kind

[17] For a comprehensive overview of EAW Framework Decision transposition see *Fichera* [10].

[18] *De Bondt* [4], p. 131 and Platcha [20], pp. 170–178.

[19] *Falkiewicz* [8], pp. 258–275.

[20] See footnote 3.

[21] Case C-305/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, EU:C:2007:261.

of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the issuing Member State.'

Hurdles may appear due to the fact that in most Member States, what was initially conceived as an optional ground for refusal has been transposed as a mandatory one, leading to numerous criticisms, which are shared by the author.[22]

However, the legislative reality in the Member States shows how common this transposition technique is. We may quote three examples, among many others.

In the United Kingdom, Sects. 64(3)(b) and 65(3)(b) of the Extradition Act[23] make it a condition of extradition in the context of the EAW—both for prosecution and for the enforcement of a sentence—that the conduct would have constituted an offence if it had been committed in the United Kingdom.

In France, Art. 695-23 of the Code of Criminal Procedure[24] introduced by Act 2004-204, of 9 March 9 2004, provides that, except for the crimes included in the 32 categories of Article 2(2) of the EAW Framework Decision, surrender is to be refused if the fact that gives rise to the extradition request does not constitute a crime according to French Law.

In Germany, the Act on International Cooperation in Criminal Matters,[25] Article 3(1), requires for extradition that an offence is also an act contrary to German law or, *mutatis mutandis*, the offence could also constitute a crime in Germany; establishing in its Part VIII dedicated to the Extradition and Transit between the Member States of the European Union, Article 81, complementary punishable requirements aligned with those foreseen in the EAW Framework Decision and carrying out a literal transposition of Articles 2(2) and 4(1), second paragraph, of the Framework Decision.

Conversely, in Spain, the transposition path follows the letter of the EAW Framework Decision and does not convert the optional ground for refusal of Article 4(1) of the EAW Framework Decision to a mandatory one. Article 20 of the Spanish Act on Mutual Recognition of Judicial decision in criminal matters in the European Union[26] excludes infractions of Article 2(2) of the EAW Framework Decision from the need to establish double criminality. Paragraph 4 provides that 'when the order or judicial decision received is to punish an act classified as an offence other than those foreseen in this Article, their recognition and enforcement may be submitted to fulfilment of the double criminality requisite [...]'. Article 32(2) of the Spanish Act on Mutual Recognition has the same effect.

[22] *Klimek* [13], pp. 8–9.

[23] Extradition Act 2003, Chap. 41. Available at: https://www.legislation.gov.uk/ukpga/2003/41/contents.

[24] Code de Procédure Pénale. Available at: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071154&dateTexte=29990101.

[25] Gesetz über die internationale Rechtshilfe in Strafsachen (IRG) in der Fassung der Bekanntmachung vom 27. Juni 1994 (BGBl. I S. 1537), das zuletzt durch Artikel 3 des Gesetzes vom 27. August 2017 (BGBl. I S. 3295) geändert worden ist. Available at: https://www.gesetze-im-internet.de/irg/BJNR020710982.html.

[26] Ley 23/2014, de 20 de noviembre, de reconocimiento mutuo de resoluciones penales en la Unión Europea (BOE 282, de 21 de noviembre de 2014, p. 95437). Available at: https://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/English%20version%20LAW%2023%20of%202014.pdf.

3 European Court of Justice case-law regarding the interpretation of the principle of double criminality. The *Gundza-Piotrowski* paradox?

The jurisprudence of the European Court of Justice concerning mutual recognition in criminal matters is not very extensive. Nor is the number of rulings relating to the EAW Framework Decision high.[27] Nevertheless, a series of CJEU decisions can help us to form a hermeneutical frame of reference concerning EAW Framework Decision Articles 2(4) and 4(1):

a. The need for a restrictive interpretation of the grounds for refusal is constant in the thinking of the Court. Thus, in *Wolzenburg*,[28] paragraphs 57 and 58, the Court recalled the limited possibilities of the refusal of a surrender request, as Marguery[29] underlines, referring to the wording of Articles 3 and 4 of the EAW Framework Decision. Such a doctrine is invariably reflected in the Court judgments,[30] in which it is stressed that even the scope of optional grounds for refusal could be reduced by the Member States, serving better the principle of mutual recognition, of which, on the other hand, as Klip[31] points out, we do not have a definition.

b. In the same line of restrictive interpretations of exceptions to the general rule of recognition and enforcement, was the judgment handed down in the *Grundza*[32] case in which the Court considered Articles 7(3) and 9(1)(d) of the Framework Decision 2008/909 on the transfer of sentenced persons. In this judgment, the Court addresses the issue of double criminality, being the most crucial referent and entirely applicable to the interpretation of the EAW Framework Decision. We highlight the following aspect of the Court's ruling.

Commenting on Article 7(3) of the Framework Decision 2008/909, (about the double criminality-connected ground for refusal for offences other than those included in the list of 32 crimes set out in Article 7(1)), the Court recalled:

> '[...] it is open to the executing State to make recognition of the judgment and enforcement of the sentence subject to the condition that it relates to acts which also constitute an offence under the law of the executing State, whatever its constituent elements or however it is described. In other words, that provision allows the executing State to make recognition of the judgment and enforcement of the sentence subject to the requirement that the condition of double criminality is met.' (paragraph 28).

Our interpretation is that this statement expressly endorses the viability of a legislative technique transposing as mandatory that which in the Framework Decision 2008/909 is an optional ground for refusal.

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[27] Eurojust *Case law by the Court of Justice of the EU on the European Arrest Warrant* (October 2018). Available at: http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/casedsdlawanalysis/Case%20Law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the%20European%20Arrest%20Warrant%20%28October%202018%29/2018-10_EAW-case-law_EN.pdf.

[28] Case C-123/08 *Wolzenburg*, EU:C:2009:616.

[29] *Marguery* [18], pp. 84–91.

[30] Cases C-66/08 *Kozlowski*, EU:C:2008:437 and C-396/11 *Radu*, EU:C:2013:39, among others.

[31] Op. cit: p. 362.

[32] Case C-289/15 *Grundza*, EU:C:2017:4.

– Paragraphs 33 to 36 of the judgment outline the general scheme for broaching the issue of double criminality, establishing a series of essential criteria. First, it is up to the judicial enforcement authority to verify whether the facts in respect of which a person is requested constitute an offence under its national law, regardless of its constituent elements or its qualification. Secondly, it is not necessary for purposes of the comparison offering a positive result, that the offences in both states be identical. There is no need for an exact match between the constituent elements of the offence, as defined in the legislation of the issuing State and the executing State, or between the given name of the crime under the national law of the respective States (paragraph 35). Thirdly, the wording, context and objective of the Framework Decision must be taken into account, and all these factors recommend a flexible approach be taken by the competent authorities when assessing the double criminality condition. And fourthly, the relevant factors are those related to the congruence of the factual elements underlying the crime, as reflected in the ruling passed in the issuing State and the definition of a violation in the legislation of the executing State.

From the reading of this judgment it seems that in the light of the text of Framework Decision 2008/909 (and the corresponding Articles 2(4) and 4(1) of the EAW Framework Decision) it is not enough that the fact for which the surrender is requested and is defined as a crime in the issuing State may constitute any given offence in the executing State. It is necessary that the typical configuration of the behaviour in the latter has a certain degree of analogy, although not necessarily identity, with that of the issuing State. It is in this sense that we interpret the wording of Article 2(4) of the EAW Framework Decision '[...] *whatever the constituent elements or however it is described*.' It could be argued that the wording of the EAW Framework Decision suggests that whatever the possibility of subsuming (to subsume: technical term meaning put into a broader category, include a conduct into an specific crime definition and category in the Law) the facts according to the Law in the State of execution, as long as there is a 'legal classification echo' for the same behaviour, this will be enough to deny the surrender. We do not share such a hypothesis, which does not seem to be the most logical criterion for interpretation since it could completely disconnect—in terms of seriousness, and therefore of proportionality—the infringement for which a person was requested from the corresponding offence in the executing State. Additionally, it could disconnect both infractions in ontological terms and conflict with the unity or similarity of legal classification, which is the basis of dual criminality[33] and which according to Falkiewicz[34] has to be equally construed for all types of cooperation based on mutual recognition.

The issue is far from clear since the contours of the particular degree of homology we consider necessary are very diffuse, a point we shall have occasion to address below.

The *Grundza* judgment concludes that the requirement of double criminality as an exception to the general rule of recognition shall be restrictively construed (see paragraph 46) and that to assess its concurrence the essential point is to verify '[...] whether the factual elements underlying the offence, as reflected in the judgment

[33] *Plactcha* [20], pp. 170–178.

[34] Op. cit: p. 273.

handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal penalty in the territory of the executing State if they were present there' (paragraph 47) '[...] not whether an interest protected by the issuing State has been infringed, but whether, in the event that the offence at issue were committed in the territory of the executing State, it would be found that a similar interest, protected under the national law of that State, had been infringed.'(paragraph 49).

c. The judgment delivered in the *Grundza* case complements the Court's reasoning in Case *A*[35] in which the Court opined that whatever the penalty the events might entail in the executing Member State, the law of the issuing Member State is the relevant one. For the comparison contemplated by Articles 2(4) and 4(1) of the EAW Framework Decision, it suffices that the act is an offence in the executing State, regardless of the severity of the penalty involved. The Court declared inadmissible a transposition requiring that the events in the executing State be punishable by imprisonment for a maximum period of at least twelve months. Moreover, the Court ruled (see paragraphs 24, 25 and 27) that rejecting extradition via Article 4(1) of the EAW Framework Decision requires that the facts for which the person is requested are not in any way constituting an offence in the executing State, since neither Article 2(4), nor 4(1) or any other passage allow establishing the condition mentioned above of minimum punishable threshold, this being the only frame of reference that can be found in the legislation of the issuing State (paragraph 30).

d. In the recent *Piotrowski*[36] case, the CJEU considered the application of the mandatory ground for refusing to surrender a minor (see Article 3(3) of the EAW Framework Decision). This judgment is of interest as a holistic interpretation of the grounds for refusal which are contemplated in the Framework Decision.

Pursuant to Article 3(3), the EAW shall be refused if the requested person '[...] may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State.'

Citing *Grundza* and *Vilkas*[37] cases, the CJEU recalled that when construing a provision of European Union law, account must be taken not only of its written content but also of its context and the objectives pursued by the legislation of which it is a part. The Court held that the executing judicial authority should only verify whether the requested person has the minimum age to be considered criminally responsible for the facts, without taking into account any additional requirements for a personalised evaluation in accordance with the law of that Member State, in particular the existence of a prosecution or conviction against the sought person. The Polish judicial authorities requested Belgium to surrender a seventeen-year-old person, who might be held criminally responsible as an adult in Poland. In Belgium, there is a special regime for 16 to 18-year-olds, under which—after the personality of the child and other factors are considered—it is decided whether the case should be tried according to the ordinary criminal law or that relating to minors. The issue raised by the Belgian judges concerned how, in abstract or concretely, the responsibility of a minor was to be understood for the purposes of the surrender procedure. According to one

[35] Order C-463/15PPU *Openbaar Ministerie v A*., EU:C:2015:634.

[36] Case C-367/16 Piotrowski, EU:C:2018:27.

[37] Case C-640/15 Vilkas, EU:C:2017:39.

view, there was the possibility, in abstract, that a minor could be considered criminally responsible. According to a second view, a series of complicated concurrent factors should be taken into account and only if the answer to them was in the affirmative, should surrender be granted. The response of the Court of Justice was clear in rejecting the possibility of an assessment, and stipulating in particular that the conduct of an evaluation before a surrender was contrary to the purpose of a system of cooperation based on mutual recognition. This was in line with the conclusions of Advocate General Bot (see paragraphs 55 and 56) who had noted that this type of operation of specific determination of responsibility would deprive mutual recognition of any useful effect.

The content of this judgment can give rise to a certain perplexity on grounds of the different treatment that is given, in *Grundza* and in *Piotrowski*, to two similar situations: the one foreseen in Articles 2(4) in relation to 4(1) of the EAW Framework Decision; and another one contemplated in Article 3(3) as we discuss just below.

e. A joint analysis of the judgments given in the *Grundza* and *Piotrowski* cases leads us to consider a series of points, some of which may appear paradoxical and to conflict with one another:

1. When comparing the rulings handed down in the mentioned cases, the fact that the first one concerns the transfer of sentenced persons under Framework Decision 2008/909 and the latter an EAW issued for prosecution, is not relevant. In any case, the criteria for establishing double criminality refer to facts either proven in a judgment or constituting an accusation. Nor does it seem relevant that in some cases, such as *Piotrowski*, mandatory reasons for refusal have been analysed and in *Grundza* optional grounds, since these once transposed can become obligatory according to the legislation of the State in question.

The crucial aspect is trying to reconcile the two preliminary rulings offered by the CJEU. In *Grundza*, the Court maintained that double criminality is satisfied when it is verified that the facts if committed in the executing State, would be subject to criminal sanctions, which requires a considerable degree of *ad hoc* appreciation beyond a general and abstract examination. By contrast, in *Piotrowski*, the Court states that a particular comparison cannot go so far as to put the executing judicial authority in the position of reviewing the whole case again as this is incompatible with the principle of mutual recognition.

2. The differentiation between comparison *in concreto* and *abstracto* belongs rather to the academic field. We don't even count on uniform parameters in the legislation of the Member States (Advocate General Opinion in *Grundza* case, paragraphs 22 to 26 and 27). Therefore, its use to solve double-criminality related issues is questionable. Instead, the CJEU seems to opt for a technical-objective comparison that considers as a necessary and sufficient condition for assessing dual criminality that '[...] the fact that the acts giving rise to the sentence imposed in the issuing State also constitute an offence in the executing State'. From the above also follows 'that the offences do not need to be identical in the two Member States concerned' (paragraph 34 *Grundza* judgment).

What the executing authority must check is not whether the interest protected by the issuing State has been infringed, but whether '[...] in the event that the offence at issue were committed in the territory of the executing State, [...] it would be

found that a similar interest, protected under the national law of that State, had been infringed' (*Grundza* judgment, paragraph 49)

3. A consistent reading of the CJEU's case law requires a combined review of the judgments handed down in the *Grundza* and *Piotrowski* Cases and the order issued in Case *A*.

In principle, a separate reading of each of these resolutions could lead to contradictory conclusions, as follows:

In its order issued in Case *A*, the CJEU reminds us that the penalty foreseen for the offence in the executing Member State is not relevant, the surrender requirement being that the facts in the issuing State are punishable by a penalty of deprivation of liberty of more than twelve months (see paragraphs 27 and 29 of the ruling). Even if the offence is punished with just a fine, extradition might be feasible provided that the act constitutes an offence in the executing State as well (paragraph 25).

This statement taken in isolation is both clear and, as the CJEU reminds us, coherent with its ruling in the case *Advocaten voor de Vereld* cited above. However, it raises specific questions when operating with the diagonal comparison referred to by the Advocate General in the *Grundza* case (see paragraph 56) which the Court seemed to take on board (see paragraphs 34 and 49). By applying the doctrine handed down in the *Grundza* judgment to the concept of the affectation of a similar interest in the executing State, we can inquire to what extent similarity may exist between two interests that are protected in a manner as diverse as the imposition of a fine in one state and the deprivation of liberty in another.

In other words, the method for comparing the legal consequences of the acts leads us to conclude that the notion of similar interest must be interpreted in a way as flexible and generous as the interpretation of the grounds of refusal must be restrictive.

The sentence passed in *Grundza* offers us a parameter of comparison that—without embracing the interpretation *in concreto*, the terminological inaccuracy of which sounds a warning bell—does allow a detailed analysis of the criminal law significance of the facts on which the surrender request is based, had they occurred in the executing State.

On the other hand, the judgment rendered in *Piotrowski* seems more restrictive regarding the possibilities for analysis by the enforcement authorities. Certainly, juvenile justice has a peculiar idiosyncrasy (reviewed in detail by Advocate General in his conclusions 35 *et seq*., and echoed by the judgment in paragraph 36). Notwithstanding the foregoing, the terms of the debate in *Piotrowski* are similar to those that arose in *Grundza* since in *Piotrowski* the Court was asked explicitly about the appropriateness of an interpretation *in concreto* or *in abstracto* of the possibility of sanctioning the conduct on which the request of the executing State was based. On the other hand, in the *Piotrowski* case, the CJEU did seem to opt for an interpretation in the abstract, in line with the Advocate General's conclusions (see paragraph 55) in which he asserted that

> '[...] It would be impossible to accept a situation in which certain Member States, on the ground that their national law takes a case-by-case approach to determine the criminal responsibility of minors, by means of an *in concreto* assessment as to whether requirements corresponding to the three criteria identified in points 36 and 37 above are met, could apply that same analysis when

acting as the executing Member State. Indeed, that would be to reintroduce an onerous system of extradition under which the executing Member State would need to be provided with the entire prosecution or conviction file, and verify that it matched its own national procedure in every aspect.'.

Along the same lines, in the *Piotrowski* case, the Court reasoned (in paragraphs 51 and 52 of its judgment) that the grounds for refusal in EAW Framework Decision Article 3(3) cannot be interpreted in such a way as to allow the executing authority to engage in an analysis not foreseen in the instrument and that a new substantive examination, of an objective and subjective nature, complementary to that already carried out by the executing Member State 'would violate the principle of mutual recognition.'

Probably we will have to wait for new rulings by the CJEU that will clear up this, at least apparent, jurisprudential paradox and illuminate us concerning the substantial differences of approach in the two approaches or the reasons for not applying a similar comparison paradigm in all cases.

4. Finally, going back to the diagonal interpretation of the conversion process that needs to be done to verify the double criminality referred to by the Advocate General in the *Grundza* case (see paragraph 56 of his Opinion), there are two additional problems that, in our view, have not yet been entirely solved in the jurisprudence of the CJEU. First, that of determining how elastic this interpretation is and what essential elements are those that ineluctably must be weighed so that there is a correspondence that—beyond criminal taxonomy—allows us to declare that a similar interest is protected in the emission and execution states. Secondly, how far does the obligation of the executing State to determine any possible correspondence extend? The questions might therefore be whether it would be enough to justify refusing a surrender to rule out the fit of the facts in a homogenous crime that is under the same or similar denomination in both States or it is necessary that the State of execution perform a sweep to detect any other possible coincidence of protected interests?

4 The *Puigdemont* case

This case could be a model for the study of the principle of mutual recognition and its application concerning double criminality in the EAW Framework Decision.

The examining judge of the Supreme Court of Spain issued an indictment against the defendants and sent an EAW to Germany—where Mr Puigdemont was arrested—requesting his extradition to Spain to be tried for the crimes of rebellion (Article 472 and related articles of the Criminal Code)[38] and embezzlement of public funds (Article 432 in combination with Article 252 of the same Act).

The *Schleswig-Holsteinisches Oberlandesgericht* (Higher Regional Court of Schleswig-Holstein), in a decision of 5 April, 2018[39] (essentially ratified by another

[38] Spanish Criminal Code, Organic Act 10/1995, BOE núm. 281, of 24 of November 1995, 33987-34058; last amended April 28, 2015. https://www.wipo.int/wipolex/en/text.jsp?file_id=415252.

[39] Order of the High Regional Court of Schleswig-Holstein. First Senate, Criminal. Case 1 Ausl (A) 18/18 (20/18), DE:OLGSH:2018:0405.1AUSL.A18.18.20.1.00.

of July 12, 2018) addressed the question of the personal situation of the defendant requested by Spain. Article 15 of Germany's Act on International Cooperation in Criminal Matters (IRG) requires the maintenance in preventive custody of a defendant unless the request for surrender is revealed *ab initio* as unfeasible. By applying such a rule, the Court concluded that, as regards the crime of rebellion, extradition must be considered unacceptable in principle. On the other hand, as regards the crime of embezzlement of public funds (a variant of the crime of corruption), the possibility of extradition was left open with certain conditions. The Court set bail so that Mr Puigdemont could avoid preventive detention during the processing of the case, following the IRG and Article 12 of the EAW Framework Decision. At the same time, it opened the possibility of the Prosecutor's Office asking the Spanish Supreme Court for additional information on the offence of embezzlement, under Article 30(1) IRG.

a. The analysis conducted by the Court of Schleswig-Holstein can be summarised as follows:

1. The crime of rebellion is not in the list under Article 2(2) of the EAW Framework Decision (Article 81 IRG). Therefore, it is required, according to the IRG (see Articles 3(1) and 81(4) a *contrario sensu*) to verify that the facts for which the Spanish citizen is requested would be a crime in Germany.

To carry out this check, the Court referred to the analogous conversion, the guideline of Article 3(1) IRG: that is, *mutatis mutandis*, the crime could also constitute a criminal offence in Germany, in line with Article 2(4) of the EAW Framework Decision.

Next, the Court reasoned that Sects. 81 and 82 of the German Criminal Code (StGB),[40] which define the crime of high treason against the Federation or against a State of the same, would not be applicable in this case, since German jurisprudence, which the Court cited, required that the facts result be basically comparable and also a sort of locative exegesis, imagining the events as occurring in Germany. This requirement was studied in turn in the light of the jurisprudence of the *Bundesgerichtshof* (the Federal Court of Germany) on the crime of high treason and the violence necessary for its assessment, all stemming from incidents that took place at Frankfurt airport in 1983.[41]

The Schleswig-Holstein Court admitted that the reference under Sect. 81(1) StGB to 'whomsoever undertakes, by force or through threat of force, 1. to undermine the continued existence of the Federal Republic of Germany, or 2. to change the constitutional order based on the Basic Law of the Federal Republic of Germany [...]' could be comparable to the crime of rebellion in Spanish Law. Further, the Court ruling stated that it was undeniable that a referendum designed to lead to the independence to a region of a state would correspond with the intention of endangering the existence of the State. However, following Federal Court doctrine, the decision

[40] Criminal Code (version promulgated on 13 November 1998), Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799. Available at https://www.gesetze-im-internet.de/englisch_stgb/index.html.

[41] Federal Court of Germany, Judgment, of 23 of November 1983, 3 StR 256/83. Available at: https://opinioiuris.de/entscheidung/1244.

concluded that does not provide the violence necessary to pose a real threat to bend the will of the government.

2. Regarding the crime of embezzlement, this conduct is qualified in the received EAW under the heading of corruption, listed in Article 2(2) of the EAW Framework Decision. However, a deficit was noted in the information provided, meaning that it would not meet the requirements of Article 83a(1)(5) IRG regarding the description of the circumstances in which the events occurred and the data that would allow the crime to be attributed to the behaviour of the defendant. For this reason, the possibility was opened up to the Office of the Prosecutor to request additional information from the issuing authority under Article 30(1) IRG.

3. This decision and the decision of the same Court of Justice of 12 July 2018 under Article 32 IRG, which allowed Mr Puigdemont to be extradited only for the offence of breach of trust, may, if the analysis carried out at first instance is accepted, constitute one of the points at issue in the system.

b. Factors appearing to undermine the strength of the principle of mutual recognition:

– The transposition technique used in Germany converts the optional grounds for refusal of Article 4(1) in relation to Article 2(4) of the EAW Framework Decision to mandatory grounds in Articles 3 and 81 IRG, with the disadvantages described above.

– The position of the German Court maintains an interpretation close to what De Bondt[42] refers to as reinforced double criminality. It is not enough that this is a crime in the issuing State, nor that for similar types German Law provides, or protects the same or similar legal rights; it is necessary on the contrary to imagine that, had the facts happened in Germany, with the same actors and circumstances, they also would have constituted a criminal offence.

Certainly, the doctrine of the judgment passed in the *Grundza* case supports the correctness of this interpretative option (sanctioning this comparison in paragraphs 47 and 49). But neither can we ignore that the same judgment, in paragraphs 33 to 35, teaches us what should be the interpretive guideline of Article 7(3) of Framework Decision 909/08, and of the clause that the surrender may be subject to the fact that the facts are also an offence in the executing State '[...] *whatever its constituent elements or however it is described*.'. The CJEU interprets this provision as an opportunity to accommodate partially dissimilar offences, to recognise the essential similarity beyond the *nomen iuris*; without it being necessary for infractions to be identical in both States (paragraph 34), acknowledging '[...] *that there does not have to be an exact match between the constituent elements of the offence, as defined in the law of the issuing State and the executing State, respectively, or between the name given to or the classification of the offence under the national law of the respective States*see.' (see paragraph 35). The assessment of the requirement of double criminality must be flexible, both as regards the constituent elements of the infraction and the qualification of the double criminality (paragraph 36).

The *Grundza* doctrine seems to leave open the door to both interpretation in *abstracto* and in particular the requirement of double criminality, although ultimately

[42] *De Bondt* [5], p. 108.

opting for a more concrete approach derived from the mechanism of comparison that it advocates. Even so, we agree with Falkiewicz[43] that interpretation *in abstracto* is the approach that best satisfies the principle of mutual recognition. Providing interpretation *in concreto* might prompt the enforcement authority to perform a detailed analysis of the facts, which may not be possible at an initial moment such as that when the surrender request for prosecution is issued.

– All of the reasons above place an extradition request issued by Spain following the EAW Framework Decision, regarding the verification of double criminality, *de facto* at precisely the same level as if the extradition were requested by a State that does not belong to the European Union. The requirement of double criminalisation has to be verified comprehensively apparently detached from the idea of trust that presides over cooperation based on mutual recognition.

– The assessment made twice by the German Court of the non-existence of enough violence or compulsive capacity to justify the charge of rebellion according to German law and jurisprudence goes beyond the scope of our comment. Although some Spanish academics have criticised it,[44] we hold that the interpretation of the IRG pertains to the German Court which has used its powers of interpretation of German national law, in resorting to the example of the revolt in the airport of Frankfurt or the comparison with the crime of high treason under Sect. 81 StGB.

– The weighing on dual criminality is based on a study of German law by the Schleswig-Holstein Court that we are not in a position to question. Nevertheless, we disagree with the decision, since in the StGB there are descriptions of behaviour related to the preparation of an enterprise aimed at high treason, disobedience, resistance, rioting and others[45] that could suggest at least partial commonalities with the crime of rebellion in the Spanish Criminal Code, and consequently might have fulfilled the requirement of double criminality in the terms discussed above.

In this regard, we bring up the position of Advocate General Szpunar, expressed in the *AY*[46] Case, to which we shall return later. In paragraph 32 of his Opinion, he states that it

> '[. . .] is first and foremost, for the executing Member State to trust the actions of the issuing Member State. However, the issuing Member State must also trust the actions of the executing Member State when the latter relies on grounds of refusal of execution of an EAW. Once the issuing Member State begins to apply and interpret the law of the executing Member State and attempts to ascertain whether the latter has correctly applied the law, it moves dangerously close to a breach of that mutual trust.'

We do not share the analysis by some authors[47] regarding the inopportune rejection *ad limine* of the offence of rebellion. On the contrary, we believe that according to German legislation it was timely and formally adequate to assess the existence of

[43] *Op. cit*. [8], p. 266.

[44] *Gimbernat Ordeig* [11].

[45] Sections 83, 89a, 90a, 111, 113, 125 StGB.

[46] Advocate General conclusions, 16 of May 2018. Case C 268/17AY, EU:C:2018:317.

[47] *Mangas Martín* [17].

a crime comparable to that of rebellion in Germany. And that without prejudice of the attribution of the Court, in case there were still some doubts, to defer its decision to a later time after gathering the appropriate supplementary information under the doctrine established by the CJEU in *Aranyosi-Caldararu*, as Sarmiento[48] points out. Perhaps, as a hypothesis, it would have been of interest to broaden the level of analysis, taking to the limit the interpretative possibilities of paragraphs 47 and 49 of the judgment in *Grundza*. In this singular case, extradition was requested by the Supreme Court of a Member State for a crime of rebellion that would ultimately infringe not only the Constitution and territorial integrity of Spain, but would affect the so-called European constitutional order[49] and the integrity of the Union from which a region that would become independent of a Member State would be automatically split, as Mangas Martín[50] explains in detail. We do not believe that this would justify, *per se*, an *ad hominem* departure from the line of interpretation of this matter by the German courts, which could even come into conflict with the jurisprudence of the European Court of Human Rights set in the *Del Río Prada*[51] case. But we do allow ourselves to underline the point that a generous margin of interpretation would be highly desirable in addressing the EAW regarding an offence that attacks the rule of law (Article 1bis TEU), the issuing Member State being more competent to deal with such a alleged crime (Article 3bis TEU) as recalled by the conclusions of the Council of the European Union of 16 December 2014.[52]

c. The procedural options which remained open to the Spanish Supreme Court after the refusal of the rebellion charge may be summed up as follows.

– The first option was sought to be exercised after the coordination meeting held on 12 April 2018, at the headquarters of Eurojust. It found an echo in the press[53] although it does not appear in the press releases of that institution.[54] On 26 April, the Supreme Court sent a file with new data, clarifications and evidence, including 74 videos attached, relating to both the offence of embezzlement and that of rebellion, reenforcing the possibility of surrendering Mr Puigdemont for a crime of treason.

On 1 June 2018, the Prosecutor's Office reiterated the request before the Superior Court of Schleswig-Holstein for Mr Puigdemont's extradition for the crimes of embezzlement and rebellion, after receiving additional documentation from the Spanish authorities, but the latter maintained its initial assessment. The Public Prosecutor's approach was that the requirements of double criminality were met concerning the crimes of rebellion and embezzlement (subsumed within corruption, included in Ar-

[48] *Sarmiento* [21].

[49] *Fich* [9], pp. 151–195.

[50] *Mangas Martín* [16], pp. 47–68.

[51] Del Río Prada v Spain, Appl. no. 42750/09, CE:ECHR:2013:1021JUD004275009.

[52] Conclusions of the Council of the European Union and the member states meeting within the Council on ensuring respect for the rule of law. General Affairs Council meeting Brussels, 16 December 2014. Available at: http://www.consilium.europa.eu/media/24875/146323.pdf.

[53] See, *Reuters*, 11 April 2018. Available at: https://es.reuters.com/article/topNews/idESKBN1HI2ND-OESTP or *El País*, 12 April 2018. Available at: https://politica.elpais.com/politica/2018/04/11/actualidad/1523408741_222117.html.

[54] Eurojust Press Centre. Press releases. Available at: http://www.eurojust.europa.eu/press/PressReleases/Pages/2018.aspx.

ticle 2(2) of the EAW Framework Decision), correspondence existing between the crime of rebellion in Spain and high treason as foreseen in Sect. 81 StGB. Furthermore, the Prosecutor's Office claimed that the Court had exceeded its authority by entering into the merits of the case.

However, the final decision adopted on 12 July 2018, by the Regional Court of Schleswig-Holstein, by Article 33 IRG ratified what was resolved in the first instance by the same Court in April and granted the extradition of the defendant only for the crime of embezzlement.

– Concerning the possibility of a reference for a preliminary ruling by the examining judge of the Supreme Court to the CJEU, it seems to be somewhat inconsistent with the essence of the Articles 267 TFEU and 19()(b) TEU.[55] The premise of such a mechanism is that the judge or court that deals with a matter consider that the answers of the CJEU 'on the interpretation of the treaties or the validity and interpretation of the acts adopted by the institutions, bodies, offices or agencies of the Union' (see sections a) and b) of Article 267 TFEU) be necessary to its ruling. (See, in the same sense, the Recommendations provided by the CJEU in this regard, at paragraphs 5, 12, 15, 16 and 24.[56])

In the situation we are analysing, a ruling by the CJEU regarding Articles 2(4) and 4(1) of the EAW Framework Decision might not be necessary for the Spanish examining judge to resolve what he considers appropriate in order to issue an EAW. It would be for the German Court to consider the necessity of this before ruling on extradition. A request for a preliminary ruling raised by the investigating judges of the Supreme Court of Schleswig Holstein would bring together both parties concerned with the case (Spanish and German courts) with force of res judicata (*Milch*[57] case). It would also bind, in general, the courts of other Member States, as Schermers[58] recalls, but it would be extremely complicated to expect such linkages to operate in relation to a decision already taken by the authorities of another State (as follows from the study on the question of the retroactivity of the decisions of the CJEU of Cobreros Mendazona[59]).

Particularly interesting in this regard, is the Opinion of the Advocate General in the *AY* case cited above. The County Court of Zagreb, Croatia, referred to the CJEU a request for a preliminary ruling related to an EAW sent to Hungary to claim the citizen AY in 2013 and 2015. Mr AY was not surrendered since Hungary opened criminal proceedings on the same facts, in which AY testified as a witness, and filed the case. In this context, the Zagreb Court asks the CJEU regarding the refusal of surrender by the Hungarian judicial authorities.

The Advocate General opined that what could be decided by the CJEU would not affect the issuing authority which had made the preliminary reference, observing: 'this appears odd, as the answer provided by the Court would only concern the

[55] On the preliminary ruling, in general, see *Vandersanden* [23].

[56] Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2018] OJ C 257/01.

[57] Case C-29/68 *Milch-, Fett- und Eierkontor GmbH c. Hauptzollamt Saarbrücken*, EU:C:1969:27.

[58] *Schermers* [22], p. 392 *et seq*.

[59] *Cobreros Mendazona* [3], pp. 127–141.

executing authorities.' (paragraph 20). In paragraphs 21 to 34 of his Opinion, the Advocate General gave his view of the competence of the CJEU to answer the questions raised. Analysing Article 267 TFEU, Advocate General Szpunar affirmed that '[...] [*i*]*t is apparent from Article 267*(2) *TFEU that the Court of Justice has jurisdiction to give a preliminary ruling where a decision on a question referred is considered by the referring court to be* "necessary" to enable it to give judgment.' (see paragraph 25 of his Opinion,). In paragraph 26 of his Opinion, the Advocate General stated that i'[i]n a case such as the one at issue I very much fail to see the necessity of the Court's reply for the procedure before the referring court [...]'. Finally, in paragraph 32, he recalled that the mechanism established for preliminary ruling provides that '[...] national courts supply the facts and the description of the national law at issue in order to enable the Court to provide a useful and purposive interpretation of EU law. This can, however, only be guaranteed if the referring court is actually in a position to then apply the Court's interpretation to the case at issue. Since the Croatian court cannot apply Hungarian criminal law, the Court's reply will be devoid of purpose in this context.'

However, the Opinion of the Advocate General (followed by the Spanish Supreme Court's examining judge in his order of 19 July 2018,[60] which rejected the surrender of Mr Puigdemont only for embezzlement—and withdrew the EAW) was not shared by the CJEU in its judgment of 25 July 2018. In a decision with which we disagree, the CJEU reasoned that the approach of the matter is pertinent, interpreting restrictively the possibility for the Court to refuse to rule. The judgment underpins the ontological assumption of such an approach as it is for the referring judicial body to withdraw the EAW or not (see paragraphs 24 to 27 of the Court's ruling).

Undoubtedly, there is scope for hermeneutic research on the integration and compatibility of the CJEU jurisprudence regarding the grounds for refusal of an EAW when the facts do not constitute an offence in the executing State, the relevance of the comparison of infractions in concrete or abstract and on the homology and seriousness thereof.

In this case, the position of the Higher Regional Court of Schleswig-Holstein, both formally and regarding its basic accommodation to the European legal framework, is factually correct and aligned with the doctrine which derives from the *Grundza* case, the key to hermeneutical vault in such matter. However, the question of the concurrent existence of double criminality in this case could have been interpreted more broadly and flexibly. The decision which was finally issued was lawful, although we disagree with the polarised approach taken to the facts by the German judges when comparing behaviours and infractions. We maintain that other more flexible alternatives were possible.

Nevertheless, seeing the position of the CJEU in the *AY* case it might have been interesting for the Spanish Supreme Court to ask the CJEU about three matters: first, the compatibility of the doctrines emanating from the *Grundza* and *Piotrowski* cases; secondly, the correctness of the German Court proceedings not exhausting all possible ways of diagonal comparison with other crimes besides the one of rebellion; and thirdly, the degree of similarity needed between the offence for which extradition was

[60] Order of 12 July 2018, special proceedings no. 20917/17, ES:TS:2018:8477A.

requested and other similar crimes under which the acts could be entirely or partially classified according to the law of the executing Member State.

– Once Germany granted surrender just for the crime of embezzlement, two alternatives were opened: either to try Mr Puigdemont solely for this felony or to withdraw the EAW.

The first of these possibilities would generate a significant logical-legal conflict since other persons, with a rank lower than that of the former president of the Autonomous Community, would face more severe charges than the president himself.

The second route (taken by the examining judge of the Supreme Court in the order of 12 July 2018), has placed the Spanish judicial authorities in an awkward and uncomfortable position. The situation which has followed offers the option of waiting for the person sought to move to another state of the Union, more in tune with the postulates of Spanish authorities in a sort of inverted forum shopping,[61] and then redirect the EAW; or definitively desist from it. The latter seems to be the situation now, putting not only Mr Puigdemont but a series of Catalan politicians who fled from Spain in a sort of limbo. They have escaped from Spanish justice and are not sought by it at this moment whereas the rest of their colleagues who did not flee are awaiting trial.

The choice which we consider the most appropriate would be to accept the surrender only for the crime of embezzlement, even if this would entail the impossibility of judging Mr Puigdemont for rebellion (under Articles 27(2) of the EAW Framework Decision and 60 of the Mutual Recognition Law).

That way an impasse would have come to an end, not in an entirely satisfactory manner, but at least a trial could be held with the presence of the principal defendant.

On the other hand, the solution that has been opted for, apart from generating the drawbacks to which we referred earlier, has increased the stupor of public opinion: perplexity that in many cases has graduated to uneasiness, confronted with the evidence of a lack of harmony between EU Member States and what is perceived as the lack of real effectiveness of the EAW, operating within what Bachmaier[62] refers to as the traditional concept of sovereignty and the strict control of double criminality.

d. From a *de lege ferenda* perspective, it also does not seem realistic (apart from the fact that it would not in any event have had retroactive effect in this case) to expect that the catalogue of crimes contemplated in Article 2(2) of the EAW Framework Decision will be expanded. According to statements by Commissioner of Justicia Vera Jourova in December 2017[63] the European Commission will not sponsor a Spanish initiative in this regard formulated under Article 2(3) of the EAW Framework Decision, other priorities existing regarding this instrument (as can be seen from information available from the legislative activity website of the European Parliament).[64]

e. We also discard the possibility of other initiatives such as pursuing Germany for breach of the EAW Framework Decision under Article 258 TFEU. The decision

[61] On forum shopping in criminal matters within the EU see *Janssens* [12], pp. 230–233 and *Lutchman* [15], pp. 3–61.

[62] *Bachmaier* [2], p. 39.

[63] https://euobserver.com/justice/140218.

[64] http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-revision-of-the-european-arrest-warrant.

of partially denying surrender is legal and essentially backed by a legislative and jurisprudential context that legitimises it, in a scenario that leads us to consider the real meaning and scope of the *Gleichstellungsprinzip*[65] (or 'assimilation principle') again.

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[65] On the assimilation principle see *De Hoyos Santos* [6], pp. 807–842; *Ambos* [1], pp. 326 et sq.; and *Vogel* [24], pp. 171 et seq.

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