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Provisional text

JUDGMENT OF THE COURT (First Chamber)

21 September 2023 (\*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Framework Decision 2002/584/JHA – European arrest warrant – Grounds for non-execution – Point 2 of Article 3 – Principle ne bis in idem – Concept of ‘same acts’ – Set of concrete circumstances which are inextricably linked together – Fraudulent activities carried out by the requested person in two Member States, through two separate legal entities and to the detriment of different victims)

In Case C-164/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Audiencia Nacional (National High Court, Spain), made by decision of 2 March 2022, received at the Court on 4 March 2022, in the proceedings relating to the execution of the European arrest warrant issued against

**Juan,**

other party:

**Ministerio Fiscal,**

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb, T. von Danwitz, A. Kumin (Rapporteur) and I. Ziemele, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Juan, by M. Díaz Perales, abogada, and R. Rodríguez Nogueira, procurador,
- the Spanish Government, by A. Gavela Llopis, acting as Agent,
- the European Commission, by J. Baquero Cruz and M. Wasmeier, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 45, Article 49(3) and Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed at Schengen (Luxembourg) on 19 June 1990 and entered into force on 26 March 1995 (OJ 2000 L 239, p. 19; 'the CISA'), of point 6 of Article 4 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('Framework Decision 2002/584'), of Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings (OJ 2008 L 220, p. 32), and of Article 8(1) and (2) of 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 (OJ 2008 L 327, p. 27).

2 The request has been made in connection with the execution, in Spain, of a European arrest warrant issued by the Tribunal Judicial da Comarca de Lisboa, Juízo Central Criminal de Lisboa, Juiz 16 (District Court, Lisbon, Central Criminal Court, Lisbon, Court 16, Portugal) for the purpose of executing a custodial sentence imposed on Mr Juan for serious fraud.

## **Legal context**

### ***European Union law***

#### *The CISA*

3 Article 54 of the CISA, which is in Chapter 3, entitled 'Application of the *ne bis in idem* principle', of Title III thereof, provides:

'A person whose trial has been finally disposed of in one contracting party may not be prosecuted in another contracting party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing contracting party.'

#### *Framework Decision 2002/584*

4 Article 3 of Framework Decision 2002/584, entitled ‘Grounds for mandatory non-execution of the European arrest warrant’, provides:

‘The judicial authority of the Member State of execution (hereinafter “executing judicial authority”) shall refuse to execute the European arrest warrant in the following cases:

...

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

...’

5 Article 4 of that framework decision, entitled ‘Grounds for optional non-execution of the European arrest warrant’, provides:

‘The executing judicial authority may refuse to execute the European arrest warrant:

...

6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;

...’

### *Spanish law*

6 Under Article 14(2) of ley orgánica 7/2014, sobre intercambio de información de antecedentes penales y consideración de resoluciones judiciales penales en la Unión Europea (Organic Law 7/2014 on exchanging information on criminal records and taking account of convictions in the European Union), of 12 November 2014 (BOE No 275, of 13 November 2014, p. 93204):

‘... Final convictions handed down in other Member States shall have no effect on the following decisions and may not lead to their revocation or review:

- (a) final decisions previously taken by Spanish courts and decisions relating to their enforcement;
- (b) convictions handed down in subsequent proceedings in Spain in connection with offences committed before the court of the other Member State handed down a conviction;
- (c) orders made or to be made pursuant to the third paragraph of Article 988 of the Ley de Enjuiciamiento Criminal (Code of Criminal Procedure) which sets limits on the execution of sentences, including those referred to in point (b).’

7 The third paragraph of Article 988 of the Code of Criminal Procedure provides, in essence, that, where the person found guilty of several criminal offences has been convicted in different proceedings for acts which could have formed the subject of a single set of proceedings, the limits established in Article 76 of the Código Penal (Criminal Code) are to apply. According to the latter article, the maximum period for which the offender may serve the sentence may not exceed three times the duration of the most serious of the sentences incurred and may not, in principle, exceed 20 years.

### **The main proceedings and the questions referred for a preliminary ruling**

8 The requested person, a Spanish national, was remanded in custody in Spain, where he is serving a prison sentence of 11 years and 10 months. That sentence was imposed on him for serious fraud and money laundering by judgment of the Audiencia Nacional (National High Court, Spain), of 13 July 2018, which was partially set aside by judgment of the Tribunal Supremo (Supreme Court, Spain), of 4 March 2020 ('the Spanish judgment').

9 On 20 January 2020, the requested person was also sentenced, by a judgment of the Tribunal Judicial da Comarca de Lisboa, Juízo Central Criminal de Lisboa, Juiz 16 (District Court, Lisbon, Central Criminal Court, Lisbon, Court 16), to six years and six months in prison for serious fraud ('the Portuguese judgment'). A European arrest warrant was therefore issued against him for the purpose of executing that sentence and forwarded to the competent Spanish authorities ('the European arrest warrant at issue').

10 It is apparent from the European arrest warrant at issue that the requested person was, since 30 May 2001, chairman of the board of directors of a company established in Portugal ('the Portuguese company'), entirely controlled by a company established in Spain ('the Spanish company'), of which the requested person was also, since 29 January 2001, chairman of the board of directors.

11 The main activity the Portuguese company carried out in Portugal was the same as that carried out by the Spanish company in Spain, namely the marketing of investment products that were subject to the guarantee that, at the end of the contractually agreed period, they would be redeemed at a price corresponding to the invested capital plus interest at rates higher than those normally offered by financial institutions. In reality, these activities concealed a fraudulent pyramid scheme.

12 The massive uptake of those investment products by individuals allowed the Portuguese company to experience exceptional growth and expansion. After the Spanish company was subject, at the end of April 2006, to an investigation carried out by the Spanish judicial authorities, that company ceased its activities in Spanish territory in May of the same year.

13 When the capital-raising activity of the Portuguese company was also terminated, owing to the intervention of the Portuguese judicial authorities, that company ceased to honour its price redemption commitments with its investors, who all suffered significant financial losses.

14 In that context, by order of 20 December 2021, the Juzgado Central de Instrucción nº 1 de la Audiencia Nacional (Central Court of Preliminary Investigation No 1 of the National High Court, Spain) refused to execute the European arrest warrant at issue on the ground that the requested person was a Spanish national, but decided that he would serve in Spain the sentence imposed in Portugal.

15 The requested person, who brought an appeal against that order before the Audiencia Nacional (National High Court), the referring court, claims that the facts on which the Spanish judgment is based are the same as those that form the subject of the Portuguese judgment and alleges infringement of the principle *ne bis in idem*. Consequently, according to that person, the European arrest warrant at issue may not be executed and the Portuguese judgment may not be enforced.

16 In that regard, the referring court specifies, on the one hand, that it follows from the statement of facts and from the grounds of the Spanish judgment that that judgment mainly concerns fraud committed by the Spanish company in Spain. On the other hand, the Portuguese judgment mainly applies to the activities carried out by the Portuguese company in Portuguese territory alone. Furthermore, the injured persons, as referred to in each of those two judgments, are not identical and those responsible for the acts are only identical in part. Thus, having regard to the Spanish case-law on the principle *ne bis in idem*, the referring court is inclined to consider that, in the present case, the '*idem*' condition appears not to be satisfied.

17 However, that court states that, even if this were not a situation in which the principle *ne bis in idem* applied, it must nevertheless be held that there is a set of criminal acts in the present case which may be classified as a 'continuing criminal offence' within the meaning of Spanish criminal law. Such a continuing criminal offence would cover all of the acts, including those committed in Portugal, and a single sentence should be applied to them.

18 In that regard, the referring court considers that, in a situation such as that at issue in the main proceedings in which the acts constituting a continuing criminal offence were prosecuted in two separate sets of proceedings and led to two decisions from different courts in different Member States, neither Spanish law nor EU law provides for the procedure to be followed in setting an upper limit for the sentence.

19 Moreover, the referring court states that, in the present case, it also cannot apply the Spanish procedural mechanism for combining sentences, as provided for in the third paragraph of Article 988 of the Code of Criminal Procedure, in order to observe the principle of proportionality of penalties.

20 In any event, that situation, in addition to disregarding the requirement for penalties to be proportional when punishing criminal offences, as provided for in Article 49(3) of the Charter, runs counter to the principle of mutual recognition of judicial decisions, as provided for in Framework Decision 2008/909, and to the taking account of convictions in the Member States of the European Union, as provided for in Framework Decision 2008/675, and also jeopardises the effectiveness of the provisions of Framework Decision 2002/584, in particular point 6 of Article 4 thereof, since it affects the free movement of Union citizens.

21 In those circumstances, the Audiencia Nacional (National High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) ... In the present case, [does] a situation of "*bis in idem*" for the purposes of Article 50 of the Charter ... and Article 54 of the [CISA] [arise], on the grounds that, according to the scope ascribed to that concept by [EU] case-law, the same acts are involved; or [is it] instead for this court to make the assessment, based on the principles set out in this decision, including the requirement to apply the totality principle and for the sentence to be capped in accordance with proportionality criteria, on the grounds that the case involves a single continuing offence[?]

(2) If it is concluded that a situation of “*bis in idem*” does not arise, on the grounds that, in accordance with the criteria put forward in this decision, the facts are not completely identical:

(a) ... In the light of the circumstances of the present case, [are] the restrictions on the effects of judgments delivered in other EU Member States expressly established in Article 14(2) of [Organic Law 7/2014], which transposes [EU] legislation, ... compatible with [Framework Decision 2008/675], and with Article 45 and Article 49(3) of the Charter and the principle of mutual recognition of judicial decisions within the European Union[?]

(b) [Is] the absence of a procedure or mechanism in Spanish law which provides for the recognition of judgments delivered in other [EU Member States], for the application of the totality principle and for the adjustment or capping of sentences to ensure they are proportional, in situations where a sentence imposed by a foreign court is to be served in Spain and the sentence concerns acts which form a continuing offence or linked offences when taken in conjunction with other acts that have been tried and been the subject of a conviction in Spain, ... contrary to Article 45 and Article 49(3) of the Charter, [read] in conjunction with [point 6 of Article 4] of [Framework Decision 2002/584] and Article 8(1) and (2) of [Framework Decision 2008/909], and, in general, with the principle of mutual recognition of judicial decisions within the European Union[?]

### **Procedure before the Court**

22 In accordance with Article 107 of the Rules of Procedure of the Court of Justice, the referring court requested, in conjunction with its request for a preliminary ruling, that that request be dealt with under the urgent preliminary ruling procedure. In support of its request, that court stated that the case in the main proceedings concerns ‘criminal proceedings in which the person concerned is incarcerated in a prison, where he is serving a fixed-term sentence without having any certainty as to the length of time for which he will ultimately have to serve his prison sentence, proceedings which also affect his prison regime, his release on temporary licence, his progression through prison grades and the calculation of the time required to secure conditional release in the final phase of serving his sentence’.

23 On 16 March 2022, the Court decided, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that there was no need to grant that request, since the conditions of urgency laid down in Article 107 of the Rules of Procedure were not satisfied.

### **Consideration of the questions referred**

#### ***The first question***

24 According to the settled case-law of the Court, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to decide the case before it. With that in mind, the Court may have to reformulate the questions referred to it. The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require

interpretation, having regard to the subject matter of the dispute (judgment of 22 June 2022, *Volvo and DAF Trucks*, C-267/20, EU:C:2022:494, paragraph 28).

25 In the present case, it is apparent from the order for reference that, by order of 20 December 2021, the Juzgado Central de Instrucción nº 1 de la Audiencia Nacional (Central Court of Preliminary Investigation No 1 of the National High Court) refused to execute the European arrest warrant at issue on the ground that the requested person was a Spanish national, but decided that he would serve in Spain the sentence imposed in Portugal. Relying, *inter alia*, on point 2 of Article 3 of Framework Decision 2002/584, the requested person challenges that order before the referring court and claims that the execution of the European arrest warrant at issue must be refused on the ground that he has been finally judged in a Member State in respect of the same acts.

26 In those circumstances, without it being necessary to rule on Article 50 of the Charter or on Article 54 of the CISA, it must be considered that, by its first question, the referring court asks, in essence, whether point 2 of Article 3 of Framework Decision 2002/584 must be interpreted as precluding the execution of a European arrest warrant issued by a Member State in a situation where the offence for which the requested person has been finally judged in the executing Member State and the offence for which that person is being prosecuted in the issuing Member State are, according to the law of the executing Member State, to be classified as a ‘continuing criminal offence’.

27 As is apparent from the wording of point 2 of Article 3 of Framework Decision 2002/584, that provision sets out a ground for mandatory non-execution pursuant to which the executing judicial authority must refuse to execute the European arrest warrant if it is informed that the requested person has been finally judged in a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

28 The purpose of that provision is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, and reflects the principle *ne bis in idem* enshrined in Article 50 of the Charter, according to which no one may be tried or punished twice in criminal proceedings for the same criminal offence (judgment of 25 July 2018, *AY (Arrest warrant – Witness)*, C-268/17, EU:C:2018:602, paragraph 39 and the case-law cited).

29 One of the conditions in point 2 of Article 3 of Framework Decision 2002/584 to which the refusal to execute a European arrest warrant is subject is therefore that the requested person has been finally judged ‘in respect of the same acts’.

30 As regards the concept of ‘same acts’, the Court has held that, since point 2 of Article 3 of Framework Decision 2002/584 made no reference to the law of the Member States with regard to that concept, that provision had to be given an autonomous and uniform interpretation throughout the European Union (judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, EU:C:2021:339, paragraph 70 and the case-law cited).

31 In addition, that concept should be interpreted as referring only to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (judgment of 29 April 2021, *X (European arrest warrant – Ne bis in idem)*, C-665/20 PPU, EU:C:2021:339, paragraph 71 and the case-law cited).

32 More specifically, the Court has held that identity of the material facts is understood to mean a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)*, C-365/21, EU:C:2023:236, paragraph 38 and the case-law cited).

33 By contrast, the principle *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)*, C-365/21, EU:C:2023:236, paragraph 37 and the case-law cited).

34 Furthermore, the mere reference in a given judgment to a factual element relating to the territory of another Member State is insufficient to conclude that the facts are identical. It must also be ascertained whether the court which gave that judgment has actually ruled on that factual element in order to make out the offence, to establish the liability for that offence of the person against whom proceedings were brought and, as the case may be, to impose a penalty on that person, such that the offence is to be regarded as encompassing the territory of that other Member State (see, to that effect, judgment of 22 March 2022, *Nordzucker and Others*, C-151/20, EU:C:2022:203, paragraph 44).

35 It is for the referring court, which alone has the jurisdiction to rule on the facts, to determine whether, in the present case, the acts which are the subject of the Portuguese judgment are identical, within the meaning set out in paragraphs 30 to 34 above, to those in respect of which final judgment has been passed by the Spanish courts. That being so, the Court may provide the referring court with elements of interpretation of EU law in the context of the assessment of the identity of the acts (judgment of 23 March 2023, *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)*, C-365/21, EU:C:2023:236, paragraph 39 and the case-law cited).

36 In that regard, it is apparent from the file before the Court that the requested person repeated in Portugal the fraudulent activity he was carrying out in Spain. Although those activities followed the same operating method, they were nevertheless carried out by separate legal entities, one pursuing the fraudulent activity in Spain and the other pursuing the fraudulent activity in Portugal. In addition, the referring court states that there is only occasional overlap between the acts committed in Portugal and those committed in Spain, since the fraudulent activity in Portugal continued after an investigation was opened and activity in Spain ceased. According to the referring court, the injured persons were also different. It is therefore apparent that the fraudulent activities carried out in Spain and in Portugal were not inextricably linked together. Furthermore, the referring court specifies that the Spanish judgment concerns the fraudulent activity carried out in Spain to the detriment of persons residing in Spain, while the Portuguese judgment concerns the activity carried out in Portugal to the detriment of persons residing in Portugal.

37 In those circumstances, and subject to verification by the referring court, it appears that the facts referred to in the Spanish and Portuguese judgments are not identical. The fact raised by the referring court that the offences committed in Spain and those committed in Portugal should be classified as a ‘continuing criminal offence’ under Spanish law cannot affect that conclusion, in so far as point 2 of Article 3 of Framework Decision 2002/584 requires an assessment of the material facts on the basis of objective factors which is, in accordance with the case-law cited in paragraph 31 above, irrespective of their classification in national law.

38 In the light of all the foregoing considerations, the answer to the first question is that point 2 of Article 3 of Framework Decision 2002/584 must be interpreted as precluding the execution of a



European arrest warrant issued by a Member State in a situation where the requested person has already been finally judged in another Member State and is serving a prison sentence there for the offence established in that judgment, provided that that person is being prosecuted in the issuing Member State in respect of the same acts, without it being necessary, in order to establish the existence of the ‘same acts’, to take account of the classification of the offences in question under the law of the executing Member State.

### *The second question*

39 By its second question, the referring court asks, in essence, whether, if it were necessary to refuse to execute the European arrest warrant at issue on the basis of point 6 of Article 4 of Framework Decision 2002/584 and not on the basis of point 2 of Article 3 of that framework decision, Article 45 and Article 49(3) of the Charter, provisions which enshrine, respectively, the principles of free movement and of proportionality of penalties, read in conjunction with Framework Decision 2002/584, as well as Framework Decision 2008/675 on taking account of convictions in the Member States in the course of new criminal proceedings and Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters, preclude national legislation which does not allow a single sentence to be imposed for a set of acts that may be classified as a ‘continuing criminal offence’, committed both in Spain and in another Member State, or the national mechanism for combining sentences to be applied to sentences handed down by the courts of that other Member State which must be served in Spain.

40 In that regard, the Spanish Government disputes the admissibility of the second question on the ground that, first, the purpose of the main proceedings is for it to be decided on appeal whether to execute the European arrest warrant at issue, whereas, if the executing judicial authority refused to execute that warrant and the sentences handed down in Portugal were to be served in Spain, the effects of recognising the Portuguese judgment would be dealt with, as the case may be, in new proceedings. Secondly, it submits that it is too early to seek that interpretation, since the Spanish executing judicial authority has not yet issued any final decision on the recognition and enforcement of the Portuguese judgment in Spain. Consequently, it is only once that decision has been taken that the question arises as to whether the sentences handed down in Spain and in Portugal respectively should possibly be adapted in some way.

41 According to the Court’s settled case-law, the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the former provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. Thus, the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (see, to that effect, judgment of 30 June 2022, *Valstybės sienos apsaugos tarnyba and Others*, C-72/22 PPU, EU:C:2022:505, paragraphs 47 and 48 and the case-law cited).

42 The Court cannot rule on a question referred for a preliminary ruling where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem raised is hypothetical (judgment of 19 January 2023, *Unilever Italia Mkt. Operations*, C-680/20, EU:C:2023:33, paragraph 19 and the case-law cited).

43 In the present case, a request for information was sent to the referring court inviting it to clarify, first, the connection it makes between the second question and the proceedings before it and, secondly, the reason for which a response to that question is necessary for it to rule in the main proceedings.

44 In response to that request, the referring court stated that the possible consequences of the conviction of the requested person in Spain on the enforcement, in Spain, of the Portuguese judgment will not be dealt with in the proceedings before it and that, once the non-surrender decision is final, another set of judicial proceedings for the execution, in Spain, of the sentence handed down by the Portuguese judgment will begin.

45 In those circumstances, it must be held that the question of what consequences are to be drawn from the conviction of the requested person in Spain in respect of the enforcement, in Spain, of the Portuguese judgment will not arise until a decision on the recognition of that judgment is taken, so that that question does not yet arise in the main proceedings, which concern the execution of or refusal to execute the European arrest warrant at issue.

46 Thus, it must be held that a response to the second question is not necessary in order for the referring court to be able to rule on the case before it and that, therefore, that question is inadmissible.

### **Costs**

47 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

**Point 2 of Article 3 of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009,**

**must be interpreted as precluding the execution of a European arrest warrant issued by a Member State in a situation where the requested person has already been finally judged in another Member State and is serving a prison sentence there for the offence established in that judgment, provided that that person is being prosecuted in the issuing Member State in respect of the same acts, without it being necessary, in order to establish the existence of the ‘same acts’, to take account of the classification of the offences in question under the law of the executing Member State.**

[Signatures]

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\* Language of the case: Spanish.