Neutral Citation Number: [2021] EWHC 3001 (Admin)

Case No: CO/187/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2021

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

GUENTHER KLAR	**Appellant**
- and -	
COURT OF FIRST INSTANCE BRUSSELS (BELGIUM)	**Respondent**

- -
- -

Mark Summers QC and Joel Smith (instructed by **Howard Kennedy LLP**) for the **Appellant**
Clare Montgomery QC and Florence Iveson (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 19 October 2021

- -

Approved Judgment

Mrs Justice Steyn :

A. Introduction

1. The appellant, Guenther Klar, is the subject of a European Arrest Warrant issued by the respondent, an Investigative Judge at the Dutch-Language Court of First Instance of Brussels, on 15 April 2019 ("the warrant"). The warrant seeks the appellant's return to stand trial for offences of tax fraud, money laundering and participation in a criminal organisation, by which conduct it is alleged the Belgian State has been defrauded of €22,732,088.75, of which €11 million was actually paid out. It is only right to record that as these are extradition proceedings Mr Klar has not set out his defence to the allegations made against him.

2. The warrant was certified by the National Crime Agency on 17 June 2019 and the appellant was arrested the following day. He has been on bail throughout these extradition proceedings, having been released on conditional bail by Westminster Magistrates' Court on 18 June 2019.

3. The appellant's extradition hearing was heard by District Judge Zani ('the judge') on 8-9 December 2020. On 14 January 2021, the judge handed down judgment and made an order for Mr Klar's extradition, against which he now appeals.

4. Leave to appeal was granted by Johnson J on three grounds, namely:

   i) The judge erred in finding that the warrant complies with the requirement in s.2(4)(c) of the Extradition Act 2003 ("the 2003 Act") ("the section 2 ground").

   ii) The judge erred in finding that the warrant complies with sections 10 and 64 of the 2003 Act ("the dual criminality ground").

   iii) The judge erred in finding that the warrant complies with section 12A of the 2003 Act; no decision has been taken to try Mr Klar in Belgium, and Mr Klar's absence from Belgium is not the sole reason for the failure to take this decision.

5. Since leave was granted, the Divisional Court has given judgment in *Killoran v Belgium* [2021] EWHC 2290 (Admin), which has the effect that the appellant's third ground, based on s.12A, cannot succeed. In written submissions, the appellant initially sought to contend that *Killoran* was decided *per incuriam*, and to adduce foreign law expert evidence in support of that submission. However, on the eve of the hearing, Mr Mark Summers QC, on behalf of the appellant, indicated that that argument would not be pursued. At the outset of the hearing, Mr Summers conceded ground three (subject to reserving his position in respect of any appeal), and withdrew the application to admit new evidence. Accordingly, the argument before me was limited to the first two grounds.

B. This court's powers on appeal

6. The court's powers on appeal are set out in s.27 of the 2003 Act. As the application to adduce fresh evidence has been withdrawn, and no new issue has been raised, on this appeal the relevant power is contained in subsection (3): the court may allow an appeal if the appropriate judge ought to have decided a question before them differently, which

would have required the judge to order the requested person's discharge. The question is whether the judge made the wrong decision. It is only if the court concludes that the decision was wrong that the appeal can be allowed: see *Poland v Celinksi* [2015] EWHC 1274 (Admin), [2016] 1 WLR 551 at [24].

C. The warrant and further information

7. Box E of the warrant states (with paragraph numbers in square brackets for ease of reference):

> "[1] The present warrant relates to fraud offences that were allegedly committed at least during the period from June 2012 to May 2016 and as a result of which the Belgian State has very probably been defrauded out of over 22 million euros, of which 11 million euros were actually paid out as a result of unlawful reimbursements of withholding tax on dividends paid by Belgian quoted companies. Allegedly, the fraud scheme was largely organised from the Comoros.
>
> [2] The Belgian Income Tax Code provides for a tax on dividends that is collected through the withholding tax. The dividend-paying company ensures that the withholding tax is paid to the Belgian State. The net dividends are paid to the shareholders of such dividend-paying companies.
>
> [3] On foot of applicable double-taxation treaties, certain foreign companies may file an application for reimbursement of the withholding tax on dividends from Belgian companies. Such applications are mainly filed using the "276DIV form", together with a declaration of the state of residence, a 'dividend credit advice' (share portfolio with the net dividend and withholding tax) and a proof of purchase.
>
> [4] The applications are filed by the TAX RECLAIM AGENT, GOAL TAXBACK, which collects all required documents from SALGADO CAPITAL and its economic owners (5 entities). Also, the TAX RECLAIM AGENTS receive a power of attorney from the representative of these funds for filing such applications with the Belgian tax authority. According to the information available to us, there are indications that the 'dividend credit advices' that were presented, are false documents. These documents had been created on the basis of fictitious share transactions for the sole purpose of making an entity fictitiously appear as a financial beneficiary, in order to be able to file withholding tax reimbursement applications unlawfully.
>
> [5] The fraud scheme allegedly involves certain entities, i.e. American pension funds, being unlawfully and subsequently considered as the ultimate beneficiaries of shares and receivers of net dividends, for the sole purpose of obtaining an unlawful reimbursement of withholding tax. The fraud itself entails that

the "custodian", i.e. the financial party that keeps the dividends, issues a "dividend credit advice", which states that the accounts of the pension funds have been credited with the amounts of the net dividends. However, no proof of payment of such dividends to the pension funds has been found.

[6] The reclaim from the Belgian State is done by the "custodian", who uses a "tax reclaim agent" to do so. As a result, "tax reclaim agents" reclaim the same withholding tax several times on behalf of various entities. That is why the Belgian Treasury made reimbursements on the basis of fictitious share transactions without having collected the net dividend.

[7] One of these "custodians" is the company SALGADO CAPITAL (hereinafter referred to as "SALGADO") from the Union of the Comoros. It has been established that SALGADO always uses the same "tax reclaim agent", i.e. GOAL TAXBACK LTD from the United Kingdom. Via GOAL TAXBACK, applications for withholding tax reimbursements on behalf of 5 different pension funds were filed with the Belgian tax administration.

[8] GOAL TAXBACK's contact person with SALGADO is the individual named Guenther KLAR.

…

[9] The investigation has revealed that Guenther KLAR (previously GRANT-KLAR) is the beneficial owner of SALGADO CAPITAL and of 2 entities (KHAJURAHO EQUITY/TRADING SARL and EUROPA LLP EXECUTIVE PENSION SCHEME), for which such withholding tax reimbursement applications were filed, SALGADO CAPITAL acted as "custodian" for these entities, i.e. the management of the share portfolios. SALGADO CAPITAL also issued the certificates relating to the purchase of the shares.

[10] According to the analysis of the bank accounts held by SALGADO CAPITAL and Guenther KLAR, the reimbursements have mainly flowed to the personal accounts of Guenther KLAR. This does not correspond with the expected money-flows, i.e. to the entities claiming to be the beneficiaries of the dividends. The analysis of these accounts has also revealed that the net dividend and the purchase of the corresponding shares were never paid.

[11] Therefore, Guenther KLAR appears to be in control of a large number of the parties involved in the fraud scheme and appears to have received the largest part of the returns in his personal account.

> [12] The tax fraud scheme involves an alleged fraud to the detriment of the Belgian State for an amount of 22,732,088.75 euros during the period from 18 January 2013 to 31 May 2016." (emphasis added)

8. The details given in Box E then address the nature and legal classification of the alleged offences, identifying:

   i) Four offences for which the parties have used the umbrella term "the fraud offences", namely, fraud, forgery of documents, use of false documents and tax fraud, contrary to sections 193, 196, 197 and 496 of the Criminal Code and section 449 of the Income Tax Code;

   ii) Money laundering, contrary to section 505 of the Criminal Code; and

   iii) Participation in a criminal organisation, contrary to sections 324bis and ter and 326 of the Criminal Code.

9. The Framework List offences of participation in a criminal organisation, fraud, laundering of the proceeds of crime and swindling were ticked.

10. In response to requests, the public prosecutor provided the following further information on 23 June 2020 ("the 7th FI") (with paragraph numbers added in square brackets for ease of reference):

> "[1] The EAW stipulates clearly :
>
> - the criminal offence is a fraud harming the Belgian Treasury;
>
> - it was largely organized from the Comoros (the self-declared seat of the company 'Salgado International');
>
> - the fraud happened between June 2012 and May 2016;
>
> – the fraud used 'tax reclaim agents' who presented false documents documenting fictitious share transactions;
>
> - Guenther Klar was the contact person for the Salgado company during its dealings with the tax reclaim agents.
>
> [2] The EAW mentions clearly the type of fraud, the kind of documents used, the role of Salgado International, the U.S. Pension funds and the Tax Reclaim Agents. It is not possible to explain this more clearly, short of writing a book. If any information is missing, it is because the suspects have organized their fraud from abroad, carefully hiding evidence from the Belgian authorities. The first and main purpose of the EAW is to question Mr Klar in order to complete the information missing.
>
> [3] Details such as the precise amount of money defrauded (the TRA withheld a fee, reason why there is a difference between amount defrauded and amount received), or the precise date and

number of applications filed, are not necessary to determine if the arrest is justified. …

[4] Who the other members of the criminal organization are, is to be determined. The EAW clearly mentions the company SALGADO INTERNATIONAL, of which Mr Klar states to have been merely an employee. The EAW mentions the Tax Reclaim Agents, the entities Khajuraho and Europe LLP, and the American pension funds. It mentions how his wife has received some of the proceeds. The answers given by Mr Klar during the investigation will determine who amongst those people should equally be prosecuted.

[5] The exact dates extend over a wider period: applications were filed, then processed by the Tax Ministry, then paid out to the TRA, these payments were forwarded to Salgado's accounts, and finally forwarded to Mr Klar's accounts, where they were used for personal gain. All these events happened on different moments stretching in time.

…

[6] The penalties imposed by Belgian law are clearly stated. The maximum sentence of 15 years applies if Mr Klar is found guilty of being not merely a member, but the leader of the criminal organization (section 324ter §4). This is a theoretical maximum.

…

[7] All 'trading' has happened abroad, in companies and entities entirely controlled by Mr Klar. With the exception of the reclaim forms filed with the tax ministry, the Belgian authorities have never seen any accounts documenting the trades. SALGADO COMPANY has its seat in the Comoros, a poor African country plagued by civil turmoil with a crumbling legal system. Mr Klar claims to be merely an employee, but has the only signature on this company's bank accounts. The bank accounts were in the Cayman Islands. In answer to an MLA, we have received a copy of the bank statements. These statements mention no trading of shares by SALGADO. The reclaim money, that should have been forwarded to the pension funds, was mainly used for personal gain.

[8] In order to obtain millions of euro's in lawful tax reclaims, an investment in shares worth billions would be necessary. We have no indication he has ever controlled such an amount of money.

[9] Our investigators state that SALGADO and the other entities controlled by KLAR claim to have owned the amount of €3.783.137.546,-. in shares in the period 2012-2015, and pretend

> to have received dividends for these shares. No trace of these dividends was found by us, certainly not on SALGADO's bank accounts in the Caymans.
>
> [10] Three billions in investments is obviously an enormous amount, raising the question how this was financed. We do not believe that any banker would have lent such an amount to a shady African company and / or a handful of obscure pension funds."

11. On 4 November 2020, the Public Prosecutor provided further information ("the 8th FI") in which he stated:

> "5. I consider that there is already sufficient evidence to bring a case against Mr Guenther KLAR for offences forgery of documents (false tax reclaim forms), fraud and tax-fraud (the illicit claiming of tax reimbursements with false claims), money laundering (the use of bank accounts in the Cayman Islands to send the proceeds of crime to himself, then use them to pay the divorce settlement) and the control over and/or participation in a criminal organisation (the collaboration with third parties controlling the pension funds)."

D. The section 2 ground

The ground in outline

12. The appellant relies on s.2(4)(c) of the 2003 Act and contends the warrant is invalid for failure to provide the time bracket in which the offending is alleged to have occurred or sufficient particulars of conduct in respect of each alleged offence. So far as the fraud offences are concerned, he acknowledges that the court may look at the further information as well as the warrant itself, but in respect of the offences of money laundering and participation in a criminal organisation he contends the warrant is so deficient that the court is not entitled to look beyond the terms of the warrant. But even if it is permissible to consider the further information, this does not remedy the deficiency.

The legislative provisions

13. Section 2 of the 2003 Act provides, so far as material:

> "(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—
>
> (a) the statement referred to in subsection (3) and the information referred to in subsection (4), …

(3) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.

(4) The information is—

(a) particulars of the person's identity;

(b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

…" (emphasis added)

14. Section 2 of the 2003 Act implements Article 8 of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA) ('the Framework Decision'). Article 8(1) of the Framework Decision provides:

"(1) The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex:

(a) the identity and nationality of the requested person;

(b) the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;

(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2;

(d) the nature and legal classification of the offence, particularly in respect of Article 2;

> (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
>
> (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
>
> (g) if possible, other consequences of the offence." (emphasis added)

The general principles

15. It is common ground that the following basic principles apply, as summarised by Nicol J (with whom Gross LJ agreed) in *M v Italy* [2018] EWHC 1808 (Admin) at [46]:

> "i) Unless an EAW satisfies the terms of EA s.2, extradition cannot be ordered.
>
> ii) It is for the Judicial Authority to show that what purports to be an EAW does indeed satisfy the requirements of s.2 – see EA s.206.
>
> iii) In this, as in all other matters relating to the extradition, the Judicial Authority must prove its case to the criminal standard *ibid*.
>
> iv) In approaching the EAW, the District Judge must do so in the spirit of mutual trust and confidence. This must include making reasonable allowance for difficulties that may arise because of documents being written in languages other than English."

16. The judge had to be satisfied that each of the foreign offences specified in the warrant must be adequately particularised as an extradition offence: *Lewicki v Italy* [2018] EWHC 1160 (Admin) at [79].

17. In *Dhar v National Office of the Public Prosecution Service of the Netherlands* [2012] EWHC 697 (Admin), King J (with whom Moore-Bick LJ agreed) addressed the extent of the s.2(4)(c) requirement in these terms at [63] to [64]:

> "It is well established that the subsection does not demand the specificity of a count on an indictment or of an allegation in a civil pleading (see Auld LJ in *Fofana and Belise v The Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux* [2006] EWHC 744 at paragraph 39). The court must be alive to the purpose of the legislation namely that of simplifying extradition procedures so as not to put too onerous a burden on the requesting judicial authorities. The court must have regard to the object that the conduct be expressed concisely and simply. There is no requirement that it be described in legal language.

> On the other hand it is equally established that the use of the introductory word "particulars" in the subsection means that "a broad omnibus description of the alleged criminal conduct", such as "obtaining property by deception" will not suffice (see Dyson LJ as he then was in *Peter Von Der Pahlen v Government of Austria* [2006] EWHC 1672 (Admin) at paragraph 21). Although the question "how far does the warrant have to go?" admits of no prescriptive answer (see again Dyson LJ at paragraph 20 in *Von Der Pahlen*), the particulars required must at the very least in my judgment enable the person sought by the warrant to know what offence he is said to have committed under the law of the requesting state and to have "an idea" of "the nature and extent of the allegations against him in relation to that offence" (to use the language of Cranston J in *Ektor v National Prosecutor of Holland* [2007] EWHC 3106 (Admin) at paragraph 7). The amount of detail required may turn on the nature of the offence." (emphasis added)

18. The language of s.2(4)(c) is not obscure and should be given its plain and ordinary meaning albeit in the context of the objects of the Framework Decision: see *Von Der Pahlen v The Government of Austria* [2006] EWHC 1672 (Admin), per Dyson LJ at [21] and *Dhar, per* King J at [67].

19. In *Dhar* King J continued:

> "68. What *Hewitt* does highlight however, is the need when determining the adequacy of the particulars in a given case, and the significance of any lack of particulars complained of, to have regard to any potential prejudice to the Requested Person in the extradition process both in the requested state and upon his surrender to the requesting state. Clearly the particulars must be sufficient to enable him to consider whether any statutory bars may apply. Equally the particulars of the conduct alleged must be sufficiently clear and unambiguous to enable the Requested Person to invoke the principle of speciality if on his surrender, he, for example, finds himself facing allegations in the requested state as regards his degree of participation in the alleged offence (for example being that of having the master role in a conspiracy) which go materially beyond that which was alleged in the EAW. I agree again with Cranston J (see *Ektor* at paragraph 7) that where dual criminality is involved the detail must also be sufficient to enable the transposition exercise to take place.
>
> 69. It was the degree of vagueness and ambiguity of the particulars given in *Von der Pahlen* which was fatal to the validity of the warrant on the first charge in that case …
>
> 70. Overall I would adopt the approach of Lloyd Jones J in *Owens v Court of First Instance Marbella, Spain* [2009] EWHC 1243 (Admin) para 17:

> "…a balance must be struck between the requirement of particularity and the requirement that the conduct be stated concisely and simply. In determining the degree of particularity required in the description of the offence in the warrant, it is necessary to balance these competing considerations while at all times being mindful of the need to avoid unfair prejudice to the person whose extradition is sought"." (emphasis added)

20. As regards the extent of the requirement to particularise *when* the offending is alleged to have occurred, it is common ground that the warrant need not contain a date or a *precise* timeframe, but there is a need for a discernible temporal bracket of offending to emerge with reasonable clarity from the warrant. The timeframe may be loose (e.g. during 2019 to 2020), but it is necessary to know the time period within which the various offences are alleged to have been committed. See *Crean v The Government of Ireland* [2007] EWHC 814 (Admin) at [17]-[18]; *Pillar v Bow Street Magistrates' Court* [2006] EWHC 1886 (Admin) at [19]; and *McGoldrick v Hungary* [2009] EWHC 2816 (Admin) at [44] and [46].

The judge's ruling on the law

21. The judge addressed the law in respect of s.2(4)(c) of the 2003 Act at paragraphs 58-62 of his ruling. Paragraphs 60-62 address the requirement in respect of time. The judge's general observations regarding the degree of particularisation required are contained in paragraphs 58-59 where he said:

> "58. The High Court has repeatedly stated that, in effect, the requested person needs merely to be made aware of what it is that he is said to have done wrong and what crime(s) he was to be tried for in the event that extradition were to be ordered. In **Hewitt & Woodward v Spain (2009) EWHC (Admin)** it was stated by the Divisional Court that "*.....All that was required for a valid warrant was that the requested person knew what offence he was faced with*".
>
> 59. In **Sandi v Craiova Court, Romania** (2009) EWHC [3079] (Admin) at paragraph 34 of his judgement, **Hickinbottom J** (as he then was) said "*.....adopting a purposive approach, in a conviction case, the requested person will need to have sufficient details of the circumstances of the underlying offences to enable him to sensibly understand what he has been convicted of and sentenced for – and to enable him to consider whether any bars to extradition might apply. In the light of that, and having regard to Article 8(1) of the Framework Directive, I consider that it will almost always be necessary for a conviction warrant to contain the number of offences for which the requested person has been convicted – and some information about when and where the offences were committed, and the requested person's participation in them,* ***although not necessarily in the same level of detail as would be requested in an accusation case … however there is no formula for appropriate particularization.***

> ***Each case will depend on its own facts and circumstances***."
> (highlighting added)"

22. It is difficult to understand what has happened here. The words in paragraph 58 that appear to be a quotation from *Hewitt* are not, in fact, drawn from *Hewitt*, or indeed from any authority; and it is common ground that this paragraph misstates the law. The defendant needs to be told not only what offence (or offences) he is to be tried for, if extradited, but also when and where the offence is said to have happened; the degree of involvement he is alleged to have had; and to be given an idea of the nature and extent of the factual allegations against him.

23. The error in paragraph 58 is not remedied in the remainder of the section. *Sandi v Craiova Court, Romania* [2009] EWHC 3079 (Admin) is a conviction warrant case engaging s.2(6)(b) of the 2003 Act. It is possible that the judge's intention in citing it may have been to indicate that a greater level of particularisation was required where, as here, the court was concerned with an accusation warrant. But in the absence of any express explanation to that effect, and in the light of the misdirection in paragraph 58, I consider it would be unsafe to make that assumption.

24. The appellant contends that in light of the misdirection to which I have referred, I should consider the issue afresh. The respondent does not demur from that suggestion. In my view, in light of the misdirection at paragraph 58 of the ruling it is necessary to consider the question whether the conduct has been sufficiently particularised afresh.

25. In relation to particularisation of time, the judge said at [60]:

> "The word 'time' in s.2(3)(c) does not oblige the Judicial Authority to identify a precise date or timeframe over which the alleged conduct is said to have occurred. (see, for example **Crean v Ireland (2007) EWHC 814 (Admin)**."

26. The appellant contrasts the judge's wording, placing "precise" before "date", with the words used by Beatson J in *Crean* at [18] where he said "had the framers of the 2003 Act wished to require a date or a precise time frame, it was open to use the word "date" or to indicate the time frame required. The legislator has not done that" (emphasis added). He submits that the judge required neither a precise date (correctly), nor any time frame. A time frame, albeit not a precise one, is required.

27. In my view, it is clear that by placing the adjective "precise" before both "date" and "timeframe" the judge intended it to qualify both words. Beatson J's formulation is more exact, and so preferable, but on any sensible reading of the ruling, including the way the judge applies the law to the facts, it is clear he directed himself that a timeframe is required but it need not be precise. In any event, whether I approach this issue afresh or on the basis that the judge correctly directed himself would not alter the outcome.

The parties' submissions

28. The appellant submits that the description of the *conduct* in the warrant is deficient in the following ways: (i) particulars of the fraud are 'vague and abstract'; (ii) there are no particulars of the 'money laundering' allegation; and (iii) there are no particulars for

conduct amounting to 'participation in a criminal organisation'. And that while a clear *end* to the time frame has been given, when the time frame *begins* is unclear.

29. The appellant submits the s.2(4)(c) requirement to provide particulars exists to fulfil three purposes: (i) to enable the defendant to raise any of the bars to extradition (such as delay or double jeopardy), (ii) to give meaning to the principle of specialty, and (iii) to enable the transposition exercise to be undertaken where dual criminality has to be established: *Dhar* at [68].

30. When determining whether the particulars given are inadequate, the court should consider any potential prejudice flowing from the lack of particulars complained of: *Dhar* at [68]. The appellant submits that in this case the missing particulars of conduct, and the inconsistent and unclear particulars of time, matter because they effectively remove from Mr Klar the protection of specialty upon surrender. Broadly, specialty prohibits a prosecution in Belgium which travels beyond the scope of the allegations contained in the warrant: article 27 of the Framework Decision and s.17 of the 2003 Act. But without knowledge from the warrant of the extent of the conduct he faces, or its temporal boundaries, Mr Klar is deprived of the ability to know whether the prosecution is travelling beyond the terms of the warrant, leaving him unable to enforce his specialty rights. In addition, in respect of the criminal organisation offence, the appellant relies on the inability to undertake the transposition exercise.

31. In respect of the requirement to give particulars of the time when he is alleged to have committed the offences, the appellant contends there is no clarity as to the beginning. There are three potential commencement dates: 18 January 2013, June 2012, or any time prior to June 2012. In support of this submission, the appellant relies on the following:

    i) First, the warrant states the offending took place "<u>at least</u> during the period from June 2012 to May 2016" (EAW at [1] (emphasis added)).

    ii) Secondly, the warrant states the tax fraud scheme involves an alleged fraud to the detriment of the Belgian State "during the period from 18 January 2013 to 31 May 2016" (EAW at [12]).

    iii) Thirdly, in further information the Public Prosecutor states "the fraud happened between June 2012 and May 2016" (7th FI at [1]), but then continued "[t]he exact dates extend over a wider period … All these events happened on different moments stretching in time" (7th FI at [5]).

32. If he is prosecuted in Belgium for offending going back earlier than June 2012, the appellant submits he will not be able to rely on his specialty rights because of the references to "at least" and a "wider period".

33. The respondent submits that on a sensible reading of the warrant and making due allowance for linguistic differences (see *Lacorre v High Instance Court of Paris* [2008] EWHC 2871 (Admin)), it is clear that the offending is alleged to have occurred between June 2012 and May 2016, as the judge rightly found in his ruling at paragraph 66. Within that broader time frame of offending, specific incidences of tax fraud have been identified as having taken place between 18 January 2013 and 31 May 2016.

34. As regards particularisation of conduct, in respect of the alleged fraud offences, the appellant relies on *Von Der Pahlen* as indicative of the level of detail required in a complex fraud case. The argument raised in respect of the money laundering and participation in a criminal organisation offences - that the warrant is so deficient that the court is not entitled to look beyond it - is not relied on in relation to the fraud offences. The appellant accepts the court can consider the further information as well as the warrant.

35. Mr Summers submits the warrant gives details about the scheme (explaining the nature of withholding tax, what a dividend is, who is a custodian etc), but it is deficient in providing information about the allegations against the appellant. In particular, he contends the warrant fails to explain: (i) What '*money'* '*flowed to the personal accounts of Guenther Klar"*? How is it that the Belgian state was defrauded of €22m, when only €11m was '*actually paid out'* (EAW at [1] and [12])? (ii) What were the withholding tax reclaim '*applications filed'* (or even the underlying '*share transactions'*) in issue? How many are being prosecuted? Do they total €11m? Or €22m? Or some other sum? (iii) What is the identity of the five different US pension funds? (iv) How many '*dividend credit advices*' were tendered, on which dates, pertaining to which transactions?

36. On behalf of the respondent, Ms Clare Montgomery QC submits that the authorities are of no particular assistance in carrying out the task of assessing whether sufficient particulars have been provided to comply with s.2(4)(c). Every warrant is different and must be considered as a whole, making sensible assumptions where appropriate and giving due allowance for different pleading traditions and linguistic differences. The information given in this warrant is far more than a statement of the offences – or broad omnibus description, to use Dyson LJ's phraseology in *Von Der Pahlen.*

37. Ms Montgomery draws attention to the detailed particulars of the fraud offences contained within Box E of the warrant, supplemented (albeit the respondent submits they did not need to be) by the further information. She acknowledges that the warrant and further information do not contain component details, such as the number and date of each tax reclaim application or dividend credit advice, sought by Mr Summers. But Ms Montgomery submits that is not required. The outer boundaries of the fraud allegations have been set. The allegations are clear and no more is required.

38. The total sum in respect of which tax reclaims are alleged to have been fraudulently sought is given in precise detail: €22,732,088.75 (EAW at [12]). The appellant's specialty rights are protected if charges are laid in amounts going beyond that sum. The Public Prosecutor explained in the 7th FI that the difference between the amount of €22,732,088.75 fraudulently claimed from the Belgian treasury and the sum of €11 million paid out is that the tax reclaim agents withheld a fee.

39. A clear description of the nature of the fraud has been given, as well as details of the participants. This is not a case where there is any lack of clarity as to the degree of participation by the appellant in the alleged offences: the warrant and the 7th FI make clear that the fraud has been masterminded by the appellant using companies and entities controlled by him (cf *Dhar* at [81]).

40. In respect of both the money laundering and participation in a criminal organisation offences, the appellant contends that the warrant is wholly deficient for s.2 purposes

and not susceptible to correction by the provision of further information. The appellant relies on *Alexander v Public Prosecutor's Office, Marseilles District Court of First Instance, France* [2018] QB 408. Giving the judgment of the court, Irwin LJ observed at [75]:

> "None of this means that extradition can properly be achieved on the basis of a "bit of paper". In our view, there must be a document in the prescribed form, presented as an EAW, and setting out to address the information required by the Act. An otherwise blank document containing the name of a requested person, even if in the form of an EAW, will properly be dismissed as insufficient without more ado. The system of mutual respect and co-operation between states does not mean that the English court should set about requesting all the required information in the face of a wholly deficient warrant. Article 15(2) of the Framework Decision expressly concerns itself with "supplementary" information, and can properly be implemented with that description in mind. That will of course include resolution of any ambiguity in the information provided. It will include filling "lacunae". The question in a given case whether the court is faced with lacunae or a wholesale failure to provide the necessary particulars can only be decided on the specific facts."

41. The appellant contends the warrant in this case is, effectively, a blank page so far as these two offences are concerned. The power to look at further information exists within limits. There has to be a hook within the warrant itself to enable the court to look beyond the warrant. In this case, the court is only permitted to look for particulars of conduct in respect of money laundering and participation in a criminal organisation in the warrant. In any event, if the court considers that it is permissible to consider the further information, the appellant contends that the information provided is still insufficient to comply with s.2(4)(c).

42. In relation to money laundering, the appellant submits the warrant says no more than that reimbursements have mainly flowed to the personal accounts of the appellant (EAW, [10]), and that he *received* the largest part of the returns in his personal account (EAW, [11]). The warrant is, Mr Summers submits, unacceptably vague, not even saying how much the appellant received.

43. In addition, it fails to contain the true allegation which only emerges in the 8th FI. When the CPS drafted notional UK charges, for dual criminality purposes, on the basis of the warrant, the equivalent English offence was said to be 'possessing the proceeds of crime' contrary to s.329(1)(c) of the Proceeds of Crime Act 2002. However, in the 8th FI, the offence of money laundering is described as concerning "the use of bank accounts in the Cayman Islands to send the proceeds of crime to himself, then use them to pay the divorce settlement". So the appellant submits that passive receipt or possession of the proceeds is not the foundation for the money laundering allegation; it is founded on an allegation of use of Cayman Islands bank accounts to send monies, and use to pay a divorce settlement. The warrant omits any mention of Cayman Islands bank accounts, of the sending of monies through these accounts, or of the use of the monies to settle a divorce.

44. Moreover, the appellant contends that even if it is permissible to look at the further information, it is still unacceptably vague about the amount. What money was transferred? How much? When? The appellant submits that he is unable to assert his specialty rights based upon the content the 8th FI.

45. The respondent submits that when considering the particulars of money laundering it is wrong to focus only on paragraph [10] of the warrant, as the appellant seeks to do. It is necessary to consider the conduct described in the warrant as a whole. The warrant describes the way in which more than €22 million was claimed, and €11 million paid out by the Belgian Treasury, in circumstances of fraud. The appellant knew that those monies were proceeds of crime, and the money flows the largest part into his personal accounts are described. Sufficient particulars of the alleged money laundering offence were provided in the warrant, showing that the appellant's conduct at least included receipt of the proceeds of crime. In addition, the court can consider the further information in which the appellant's use of the proceeds of crime is described.

46. The appellant contends that the conduct said to amount to 'participation in a criminal organisation' is simply and completely absent from the warrant. No clue is given as to the nature of the 'organisation' said to exist, its objects or aims. A 'criminal organisation' is, according to the warrant, a 'structured association of more than two individuals', yet the warrant provides no information as to who the other individual(s) said to be involved might be. Nor is any indication provided as to what conduct is alleged to constitute the appellant's 'organisation' with them. The 2nd FI mentions the expansion of the investigation to include the appellant's former wife, but no description is given of any allegation against, or conduct concerning, her.

47. The Framework List for 'participation in a criminal organisation' is ticked, but the warrant gives no particulars of any alleged conspiracy. The notional charges drafted by the CPS, for the purposes of demonstrating the requirement of dual criminality was met, include no allegation of conspiracy. The Respondent's Notice alleged that the warrant and further information describe the appellant's engagement in fraudulent behaviour "with a number of other entities, including Salgado Capital, the various tax reclaim agents, the entities Khajuraho and Europe LLP, and the American Pension funds – this is the conduct which constitutes the Belgian offence [of participation in a criminal organisation] and would amount to a conspiracy under UK law" (emphasis added). Mr Summers draws attention to the fact that the respondent drew back in written and oral submissions for the hearing from alleging that the conduct described would amount to a conspiracy under UK law. The respondent's skeleton argument contends only that the conduct would amount to offences of (i) fraud by false representation, contrary to s.1 of the Fraud Act 2006, (ii) furnishing false information, contrary to s.17(1) of the Theft Act 1968 and (iii) possessing criminal property, contrary to s.329(1)(c) of the Proceeds of Crime Act 2002.

48. Mr Summers submits that the respondent's contention that an offence of participation in a criminal organisation can be sufficiently described without including any allegation of conspiracy is novel and wrong. The warrant, he contends, in so far as it related to participation in a criminal organisation, was 'wholly deficient' for s.2 purposes and not susceptible to correction by the provision of further information, applying *Alexander* at §75. The judge ought not to have looked beyond the warrant, and the court considering this aspect afresh should limit consideration to the warrant, and discharge the appellant in relation to this offence.

49. If the court considers that it is permissible to consider the further information, the appellant submits that it compounds rather than remedies the problem. The Public Prosecutor states in the 7th FI (at [4]) that "[w]ho the other members of the criminal organization are, is to be determined". Reference is made to Salgado International, the Tax Reclaim Agents, Khajuraho and Europe LLP, the American pension funds and the appellant's wife, and then the Public Prosecutor states that the "answers given by Mr Klar during the investigation will determine who amongst those people should equally be prosecuted".

50. In the 8th FI the Public Prosecutor states that there is sufficient evidence to bring a case for offences of 'the control over and/or participation in a criminal organisation (the collaboration with third parties controlling the pension funds)'. The appellant submits that even with this further information, the nature of his alleged involvement in the offence of 'participation in a criminal organisation' remains entirely unexplained. The 'third parties' are not named, their whereabouts are not given, and there is no description of any contact or agreement between the appellant and any other parties to the alleged criminal organisation. Mr Summers also submits that there are no particulars of the appellant's role in the organisation.

51. The respondent submits this is not an allegation of conspiracy but of being part of a criminal organisation. There was no need for the schedule of notional charges to identify a conspiracy offence. Ms Montgomery refers to the description of the notional fraud offence in which reference is made to the appellant making representations through Goal Taxback, and making claims on behalf of Salgado Capital. Similarly, the furnishing false information notional offence describes the appellant furnishing information through Goal Taxback and the possessing criminal property notional offence refers to him being in possession of reimbursements made to Salgado Capital and others. The warrant refers to Salgado, Goal Taxback, Khajuraho and Europe LLP, plus the five American pension funds. Ms Montgomery submits that is a clearly defined group.

52. With respect to the appellant's role in the criminal organisation, Ms Montgomery submits that the reference in the 8th FI to control over and/or participation in a criminal organisation is a reference to the juristic elements. There is no suggestion that the case against him is put at the level of participation rather than control. On the contrary, the warrant and the 7th FI make clear that he is the primary party in control of the organisation. In addition, a maximum sentence of 15 years only applies in the case of a 'leading individual of the criminal organisation' and Box C specifies the maximum in this case as 15 years, reflecting the description of him as having a leading role.

Analysis and decision on the section 2 ground

53. In my judgment, the judge was clearly right in his ruling that there was no failure to particularise the time when the alleged offending is said to have occurred. The time frame given has both a beginning and an end: June 2012 to May 2016.

54. The appellant acknowledges there is no doubt as to the end date. The submission that the reference to 18 January 2013 creates uncertainty as to the start date of the offending has no merit. The warrant makes clear that the specific time frame given for tax fraud offences of 18 January 2013 to 31 May 2016 falls within the broader time frame of the offending given in the first paragraph in Box E.

55. I also reject the appellant's reliance on the words "at least" in the warrant, or the statements in the 7th FI, as indicating that the timeframe could begin on any date prior to June 2012. First, some allowance should be made for the fact that the description has been translated from Dutch to English, and bearing in mind that traditions of criminal pleading vary considerably from one jurisdiction to another: see *Fofana v Tribunal de Grande Instance de Meaux, France* [2006] EWHC 744 (Admin), Auld LJ at [39]).

56. Secondly, in answer to the question as to the dates of the offending the Public Prosecutor stated: "between June 2012 and May 2016". The reference to a wider period and to events happening over time was made in the context of the Public Prosecutor's response that the precise dates on which applications were filed does not have to be provided. As the Public Prosecutor explained, the offending necessarily involved a number of steps, such as the filing of applications to the Tax Ministry, the payments made as a consequence, the forwarding of these to Salgado, and the payment of these into the appellant's accounts. This does not render unclear the wholly unambiguous statement that the alleged offending occurred between June 2012 and May 2016. I agree with the respondent that the appellant's specialty rights are fully protected by the provision of these dates.

57. As regards the particulars of conduct of the fraud offences, it is common ground that the court can consider the warrant and the further information. The conduct can be summarised as follows:

    i) Belgium has a 'withholding tax' on dividends paid to shareholders. The dividend paying company ensures that the withholding tax is paid and the net dividends are then paid to the shareholders (EAW, [2]).

    ii) Certain tax treaties allow some foreign shareholders to claim back the withholding tax which has been deducted from their dividend payments. To do so they file an application with a '276DIV' form, residence declaration, 'dividend credit advice' (share portfolio detailing the net dividend and withholding tax) and proof of purchase of their shares [EAW, [3]).

    iii) In this case, the applications for tax reimbursements were filed by a company called 'Salgado Capital' and its associated entities through a tax reclaim agent called 'Goal Taxback' (EAW, [4]). The fraud scheme was largely organised from the Comoros (EAW, [1]), the 'self-declared seat' of Salgado International (7th FI, [1]).

    iv) The 'dividend credit advices' used to obtain the tax reimbursements were false documents based on fictitious share transactions in relation to which genuine payments had not been made and net dividends had not been received. The tax reclaimed had therefore never actually been paid by the claiming entities to the Belgian Treasury (EAW, [4], [5] and [6]).

    v) The purported final recipients of the fictitious dividends (i.e. the entities supposedly entitled to reimbursement) were American pension funds (EAW, [5]), but there was no evidence in their accounts that they ever purchased the shares upon which the dividends were paid, received payments of the dividends, or received the 'reimbursed' amounts (EAW, [10]).

vi) The appellant is Goal Taxback's contact at Salgado Capital, the beneficial owner of Salgado Capital, and the beneficiary of the tax reimbursements (EAW, [8], [9] and [10]). He appears to be 'in control of a large number of the parties involved in the fraud scheme' as well as having 'received the largest part of the returns' (EAW, [11]). He claims to be an employee of Salgado, although his is the only signature on the company's bank accounts, which are held in the Cayman Islands (7th FI [7]).

vii) The total sum in respect of which tax reclaims are alleged to have been fraudulently sought is given in precise detail: €22,732,088.75 (EAW, [12]).

viii) In order to apply for over €22 million in tax reclaims, Salgado and other entities controlled by the appellant falsely claimed to have owned €3,783,137,546 in shares in the period 2012-2015, and pretended to have received dividends from these shares (7th FI, [9]).

58. I agree with the respondent's submissions regarding the sufficiency of the particulars given with respect to the alleged fraud offences. The nature of the fraud has been explained in considerable detail. The means by which the Belgian Treasury is alleged to have been defrauded has been made clear. The entities involved, and the appellant's leading role, have been described. The amount has been given precisely. And as I have said, the time frame has been set. The outer boundaries of the fraud have been set, protecting the appellant's specialty rights and, in my view, the particulars given are manifestly sufficient.

59. As regards the alleged offence of money laundering, the conduct described in the warrant must be considered as a whole. The warrant cannot properly be said to be wholly deficient. The offence of money laundering, in terms of receipt of the largest part of the proceeds of the fraud, is described in clear terms. In my judgment, it is proper, in these circumstances, for the court also to consider the further information which demonstrates that the money laundering allegations entail use as well as receipt of the proceeds. The outer boundaries of the appellant's alleged offending have been set, as for the fraud allegations.

60. I have reached a different conclusion in relation to the alleged offence of participation in and/or control over a criminal organisation. In my judgement, the particulars of conduct provided in respect of this offence are wholly deficient. In Box E the offence is described simply as "criminal organisation" (without reference to whether the allegation is one of control over or participation in a criminal organisation). The Framework List is ticked for participation in a criminal organisation.

61. The definition of a 'criminal organisation' is given in Box E. There is no reference in the warrant to any individual other than the appellant. Nor is there any reference to any kind of agreement between the appellant and any other person. Reference is made to a number of entities in the warrant, but no description of participating in a criminal organisation with them is given.

62. Although the warrant is totally lacking in particulars of *conduct* with respect to the alleged offence of participation in a criminal organisation, and particulars of conduct are required in respect of each offence, in my view, the question whether there has been a "wholesale failure to provide the necessary particulars" has to be considered by

reference to the warrant as a whole. In this case, the warrant is very far removed from being a "blank document containing the name of a requested person". On looking at the warrant alone, the court is faced with a lacuna in respect of the particulars of conduct for one of the six offences. A request for this information would properly be regarded as a request for "supplementary information" and so the court is entitled to consider the further information that has been provided, as the judge did.

63. However, I agree with the appellant that the further information does not remedy the deficiency. In my judgement, even taking the warrant and further information together, the appellant has not been given an idea of the nature and extent of the allegations against him in relation to the offence of participation in a criminal organisation.

64. The 7th FI refers to a number of companies and entities which are said to be "entirely controlled" by the appellant. The only individual referred to is the appellant's wife, but nothing more is said about her than that she received some of the proceeds. No reference to any form of agreement between the appellant and any other individual (or company or entity) is given. The 7th FI makes clear that it has not yet been determined who the other members of the organisation are. Notably, the lack of clarity does not relate only to some potential members, but to all of them, other than the appellant. And the companies and entities are said to be "entirely controlled" by the appellant.

65. Some particulars of conduct for this offence are given in the 8th FI where the Public Prosecutor refers to "the collaboration with third parties controlling the pension funds". However, neither the third parties nor the pension funds are identified. No description is given of any collaboration on the part of the appellant with anyone. Nor is there any description of the nature or structure of the organisation. In my judgement, it is telling that the respondent has been unable to perform the transposition to allege any offence of conspiracy.

66. The 7th FI refers to the maximum penalty if the appellant is found guilty of "being not merely a member, but the leader of the criminal organization", but it does not contain an allegation that he is the leader – perhaps unsurprisingly given no other member of the 'criminal organisation' had been identified. Nor does the 8th FI specify the appellant's role in the organisation. The reference to "collaboration" gives no indication as to whether it is said he was a member or had a leading role in the organisation and the offences of control over or participation in a criminal organisation are stated as alternatives. I do not consider that it can properly be assumed the allegation is that he had a leading role in the criminal organisation on the basis that a single maximum sentence of 15 years' imprisonment is stated in Box C (by reference to the six offences alleged in Box E).

67. In addressing this issue, the judge referred to the description of collaboration with third parties given in the 8th FI and stated, without further analysis, his conclusion that this was sufficient. For the reasons I have given, I am of the view that this aspect of the judge's ruling was wrong and that he ought to have ordered the appellant's discharge in respect of the offence of control over and/or participation in a criminal organisation.

68. It follows that I dismiss the appeal on this ground in respect of the allegation that insufficient particulars of time, or of conduct in respect of the fraud and money laundering offences were provided. Although there was a misdirection of law in his ruling, having considered the matter afresh, I have reached the same conclusion as the

judge on those issues. However, I allow the appeal in respect of the offence of control over and/or participation in a criminal organisation, wholly insufficient particulars of conduct having been given to comply with s.2(4)(c) of the 2003 Act.

E. The dual criminality ground

69. By his second ground, the appellant contends that there is no conduct identified for the offence of 'participation in a criminal organisation' to allow the court to conduct a proper analysis of dual criminality pursuant to sections 10 and 64 of the 2003 Act. This ground is closely linked to the last aspect of the first ground.

70. It is common ground that s.64(3) of the 2003 Act and its requirement for dual criminality applies in the present case. This requires, inter alia, that "the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom" (s.64(3)(b)). The court's task was to identify the 'essence of the conduct' which constituted the foreign offence in question and apply the transposition exercise to it: see *Norris v USA* [2008] 1 AC 920 at [99] and *Badre v Italy* [2014] EWHC 614 (Admin) at [31].

71. The appellant's submission, in short, is that there is no conduct which the Court could identify to perform the necessary transposition process. In the schedule of notional UK charges, none allege conspiracy offences as none is revealed on the face of the warrant or further information. The appellant acknowledges that "it matters not that [the foreign offence] would not be charged here in the same manner as in the requesting state" (*Tappin v USA* [2012] EWHC 22 (Admin) at [44]-[46]), but submits the conduct constituting the foreign offence in question must amount to some corresponding offence: *Badre* at [31].

72. The appellant therefore submits that in relation to the offence of 'participation in a criminal organisation', the appellant should have been discharged pursuant to s.10(3) of the 2003 Act. The judge, in his ruling on this issue simply stated that: 'Having considered the submissions made, I am entirely satisfied that the allied provisions of s.10 and s64(3) have been satisfactorily complied with and accordingly this challenge must fail.' The appellant submits the ruling discloses no attempt to engage with the issue and was wrong.

73. The respondent relies on the submissions to which I have referred in the context of the section 2 ground in support of the submission that conduct in respect of this offence has been identified. The respondent submits that the conduct in the warrant satisfies the requirements of section 64(3). The respondent identifies the three offences to which I have referred in the final sentence of paragraph 47 above. An offence of, for example, fraud involving others would cover the conduct.

74. It follows from the conclusion I have reached in respect of the allegation of participation in a criminal organisation that the respondent is not able to identify the conduct so as to enable the necessary transposition process to be performed. Accordingly, I conclude that the judge was wrong to find that the requirements of sections 10 and 64 of the 2003 Act were met in respect of the offence of control over and/or participation in a criminal organisation.

F. Conclusions

75. For the reasons that I have given the appeal is dismissed, save to the extent that it is allowed in respect of the alleged offence of control over and/or participation in a criminal organisation, on the ground that the warrant failed to comply with s.2(4)(c) of the 2003 Act and the requirements of sections 10 and 64 of the 2003 Act were not met. I will hear Counsel on the appropriate form of order.