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Legal practical case on International
cooperation in criminal matters

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Paul and Caroline met in European Union (EU) Member State Z in which Caroline has her apartment. She invited him around twice in the same week of March 2012. They had repeated intercourse, some of which was unprotected, even though Caroline had expressly requested Paul to use protection. On one occasion, Caroline was initially sleeping and then half asleep. Caroline lodged a complaint with the police station of Member State Z, of which she is a citizen.

Paul is a citizen of EU Member State X, but is living and working for more than 12 years in EU Member State Y.

The competent Public Prosecutor of Z initiated an investigation. Suspecting Paul of three criminal offences, he applied for a national arrest warrant after Paul's refusal to come to Z for formal questioning. The court issued this warrant. In view of the national warrant, the Public Prosecutor in Z issued a European Arrest Warrant.

Paul was arrested in Member State Y.

Before the judicial authority of Executing Member State Y, Paul develops three sets of supporting arguments in his defence in relation to the charges (1), in relation to the issuing of the European Arrest Warrant (2) and in relation to the consequences of a potential execution (3), in order not to be surrendered to Member State Z, the issuing Member State.

1. In relation to the charges against Paul

The Public Prosecutor of Issuing Member State Z charged Paul with unlawful coercion, sexual molestation and rape under the Criminal Code of Z (*See table (e) attached*). Paul argues that the first alleged behavior is not within the scope of the law. Secondly, he sustains the argument that sexual molestation was not constituted because of the lack of criminal intent. Finally, he considers that "rape" is not constituted within the meaning of the Framework Decision on the European Arrest Warrant. The question is: are such arguments relevant to avoid the execution of the European Arrest Warrant?

The European Arrest Warrant is based on the principle of mutual recognition. The aim of this principle is to facilitate and accelerate the free movement of judicial decisions between Member States. That is why the European Arrest Warrant was adopted to recognize requests for the surrender of a person with a minimum of formalities. In particular, the scope of double criminality has been limited.

For these reasons:

- In the terms of **Article 2.1 of the Council Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA)**, *“a European Arrest Warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months”*.
- In the terms of **Article 2.2 of the same Framework Decision**, some offences listed in this article, punishable under the same conditions for a maximum period of at least three years, *“shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European Arrest Warrant”*.
- In the terms of **Article 2.4 of the same Framework Decision**, *“for offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European Arrest Warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described”*.

As a result, all the offences covered by the European Arrest Warrant issued by the Public Prosecutor in Z are punishable by a custodial sentence, but without any indication of the precise quantum of the penalty, except for the “rape” which is punishable by up to eight years in Z. That is why two assumptions can be made about the offences of unlawful coercion and sexual molestation:

- If those offences were punishable in Z by a sentence of less than one year’s imprisonment, a European Arrest Warrant may not be issued in Article 2.1;
- If those offences, which are not listed in Article 2.2, were punishable in Z by a sentence of one to three years, executing Member State Y could subject Paul’s

surrender to the condition that those acts would have constituted an offence under the Criminal Code of Y.

With regards the last charge, Paul's conduct has been defined by the Public Prosecutor of Z as "rape" under the Criminal Code of Z. This offence is specifically pointed out in the list of Article 2.2 and punishable by a sentence of more than three years, in this case a maximum of eight years. So, double criminality does not need to be verified for the rape.

As a consequence, Paul's arguments are not relevant. The conditions for considering the execution of the European Arrest Warrant in relation to the charges are met. Indeed, even if verification of double criminality could have been made for the first two charges, Paul's surrender is mandatory on the basis of rape. Regarding the proximity of time and place, the case must be taken as a whole concerning the execution of the warrant. All other considerations regarding the qualification and the elements of the offence, whether under the law of Y or under the Framework Decision, must not be examined.

2. In relation to the issuing of the European arrest warrant

After the facts, Paul returned to Y. At the same time, in Z, the Public Prosecutor carried out some investigations, and notified Paul that he should travel to Z for formal questioning. In effect, it is provided in Z as mandatory under the Criminal Procedure Code in Z, that Paul be formally charged with the alleged offenses and brought before a criminal court. Facing a refusal, the judicial authorities of Z issued a national arrest warrant. On this basis, the European Arrest Warrant was issued. The arguments are related to the context of issuing the European Arrest Warrant, a decision which is subject to the discretion of the Public prosecutor. Hence, several questions, in relation to the hearing and to the decision to prosecute, may be raised:

- Is the executing State able to question the relevance of the instruments used regarding the principle of proportionality? In other words, is it relevant to question the existence of other legal tools that constitute less coercive measures and could be used, as Paul sustains for his defense?

- Is the executing State able to question the relevance of the existence of a decision to prosecute?

As stated earlier, the European Arrest Warrant is based on the principle of mutual recognition. In practical terms, this principle consists in mutual trust among Member States concerning the quality of their respective criminal procedures. It also means that decisions of both issuing and executing Member States must be considered as equivalent.

In the terms of **Article 1 of the Framework Decision** “*The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”.*

Moreover, **Articles 3 and 4 of the Framework Decision** provide restrictive grounds for refusal of execution of the European Arrest Warrant. None of those grounds concern a decision of issuing the European Arrest Warrant.

The current case deals with a formal questioning in Z, which should have occurred before issuing the European Arrest Warrant. Paul refused to be questioned, considering fundamental principle of criminal procedure and especially the presumption of innocence. Indeed, **Article 48 of the European Charter of fundamental rights** provides the privilege against self-incrimination. Effectively, other traditional legal tools in criminal cooperation can be used, such as videoconferencing, but the decision to use or not to use these kinds of tools is at the discretion of the issuing Member State. In this case, Z was able to choose whether or not Paul could be questioned directly by the authorities of Z or through a videoconference.

Besides, the Public prosecutor in Z took the decision to issue the European Arrest Warrant in order to carry out further investigation into Paul, according to Article 1 of the Framework Decision, for the purpose of conducting a criminal prosecution. Consideration regarding the proportionality of the issuing of the European Arrest Warrant does not fall within the grounds of non-execution of this Warrant. Conducting this review would lead to a necessary discussion on the opportunity to issue the European Arrest Warrant which is contrary to the principle of mutual recognition on which it is based.

Furthermore, the decision whether to prosecute or not is also at the discretion of the issuing State Z which could choose to issue a European Arrest Warrant in order to prosecute Paul.

Indeed, it satisfies the conditions of Article 1 of the Framework Decision, because it can be issued and executed “*for the [purpose] of conducting a criminal prosecution*”. The Public prosecutor, who was the issuing judicial authority, was competent to appreciate the opportunity to issue the European Arrest Warrant. Further prosecutions will depend on the result of the execution of the European Arrest Warrant.

As a result the European Arrest Warrant is received in each Member State without involving additional conditions in accordance with the legal order of the executing State: only a judicial review has to be made. Paul’s arguments regarding the issuing of the Warrant do not lead to the refusal of the execution of the European Arrest Warrant in this case.

3. In relation to the consequences of a potential execution

Paul objects to the execution of the European Arrest Warrant in view of the consequences that it implies, that is to say, it would be discriminatory. Indeed, Y only grants the privilege to its own nationals that they cannot be surrendered unless they can return to Y after the trial. Paul is a citizen of X but has lived and worked in Y for 12 years. The question is: is Member state Y allowed to restrict this privilege to its own nationals only or is it possible for Paul to benefit from it? If this situation is considered as discrimination, what is the impact on the execution of the European Arrest Warrant?

In terms of **Article 5.3 of the Framework Decision**, “*the execution of the European Arrest Warrant by the executing judicial authority may, by the law of the executing Member State, be subject to*” several conditions especially : “*where a person who is the subject of a European Arrest Warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State*”.

The European Court of Justice tried a case on 5th September 2012 (ECJ/12/107) about the execution of a European Arrest Warrant with a view to enforcing in its territory a custodial sentence imposed in another Member State. According to the Court, in the light of Article 18

of the Treaty on the functioning of the European Union, a Member State cannot “*without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non-execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution*”. But that does not mean that Member State must necessarily refuse to execute a European Arrest Warrant issued against a person resident or staying in its territory, “*in so far as that person demonstrates a degree of integration in the society of that Member State comparable to that of a national thereof*”.

Paul’s argument leads to consideration of the consequences of potential execution of the European Arrest Warrant. According to him, this argument could hinder his surrender. In this case, the application of the law of Y would place Paul in a situation of discrimination. Indeed, as he is just a resident and not a national, he could not benefit from the same privilege for the execution of a potential judicial decision issued by Z. As a result, the case mentioned above which was based on article 4.6 could be extended to a European arrest warrant issued for the purpose of conducting a criminal prosecution, by applying article 5.3.

Paul who has lived and worked in Y for more than twelve years, is in a situation that justifies that the privilege granted for nationals of Y should be applied to him.

As a result, Paul’s argument about the risk of discrimination is relevant. Nonetheless Y must not refuse to execute the European Arrest Warrant. Furthermore, as long as Paul can demonstrate a sufficient degree of integration in Y, his surrender could be subject to the condition that he would be returned to Y after being heard in Z in order to serve the potential sentence issued against him.

Annex : European Arrest Warrant

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(e) Offences:

This warrant relates to in total: **3** offences.

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:

In Member State Z, by Paul citizen of Member State X but who is living and working in Member State Y, on 13th and 18th March 2012, on Caroline, citizen of Member State Z.

Nature and legal classification of the offence(s) and the applicable statutory provision/code:

1/ Unlawful coercion, article [xx] under the Criminal Code of Z

2/ Sexual Molestation, article [yy] under the Criminal Code of Z

3/ Rape, article [zz] under the Criminal Code of Z.

I. If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

- n participation in a criminal organisation;
- n terrorism;
- n trafficking in human beings;
- n sexual exploitation of children and child pornography;
- n illicit trafficking in narcotic drugs and psychotropic substances;
- n illicit trafficking in weapons, munitions and explosives;
- n corruption;
- n fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities' financial interests;
- n laundering of the proceeds of crime;
- n counterfeiting of currency, including the euro;
- n computer-related crime;
- n environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- n facilitation of unauthorised entry and residence;
- n murder, grievous bodily injury;
- n illicit trade in human organs and tissue;
- n kidnapping, illegal restraint and hostage-taking;
- n racism and xenophobia;
- n organised or armed robbery;
- n illicit trafficking in cultural goods, including antiques and works of art;
- n swindling;
- n racketeering and extortion;
- n counterfeiting and piracy of products;
- n forgery of administrative documents and trafficking therein;
- n forgery of means of payment;
- n illicit trafficking in hormonal substances and other growth promoters;
- n illicit trafficking in nuclear or radioactive materials;
- n trafficking in stolen vehicles;
- rape;
- n arson;
- n crimes within the jurisdiction of the International Criminal Court;
- n unlawful seizure of aircraft/ships;
- n sabotage.*

II. Full descriptions of offence(s) not covered by section I above:

1/Unlawful coercion by lying on top of Caroline, holding her arms, spreading her legs and trying to have unprotected sex (vaginal intercourse) with her.

2/Sexual molestation by consummating intercourse and ejaculating although the condom had torn on the same occasion.