THEMIS FINAL - 2012

Practical Case

Team France 2

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QUESTION 1-A

Caroline and Paul met in Member State Z. She invited him to her apartment. Paul tried to have unprotected sex whereas she wanted him to use a condom. The prosecutor from Member State Z considers that Caroline is a victim of unlawful coercion. But Paul's defence lawyer denies that these facts can be qualified as a criminal offence. As a trainee in a court in Member State Y, we are entitled to assess the legal validity of this argument in order to help our tutor take his decision on Paul's surrender.

The Framework Decision of 13 June 2002 on the European Arrest Warrant (hereinafter EAW FD) makes a distinction between the conditions dealing with the issuing of a warrant and the conditions dealing with the execution of a warrant. According to Article 2.1, **the issuing of an EAW** requires the existence of an offence answering to specific conditions: it states that an EAW may be issued for acts punishable by at least twelve months of imprisonment under the issuing State's law, or where a sentence or an order of at least four months' detention has been passed. Without knowing exactly Member States Z and Y's criminal laws and case laws, and since criminal law is not harmonized between EU Member States, it is hard to claim that the conditions under which an EAW can be issued are met. Yet, we have to consider both hypotheses to tackle this problem:

– if it is assumed that the facts of "laying on top of Caroline, holding her arms, spreading her legs and trying to have unprotected sex with her" constitute unlawful coercion punishable by at least twelve months of imprisonment, then the issuing of an EAW is legal.

– if it is assumed that these facts constitute unlawful coercion but are not punishable of by least twelve months of imprisonment, or do not constitute any offence at all, then the issuing of an EAW is not legal.

In fact, this distinction refers to the possibility or the impossibility for the executing Member State to **check the validity of the issuing of the warrant**, for which the Framework Decision gives no clue. In a decision of 7 March 2007, the French Cour de Cassation held that the executing Member State may check that those conditions for issuing an EAW are fulfilled. But as we think that such case law may not be appropriate because it may be contrary to the mutual recognition principle, which is at the heart of the functioning of the EAW (Article 1.2[1]), we assume that such checks should not exist and should not be carried out by competent authorities from Member State Y. Indeed, other national courts (and even the French Cour de Cassation itself) have sustained the

[1] *Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition (...)*

opposite position.

Therefore, **Paul's argument is not relevant to allow him to deny that facts do not amount to a criminal offence under the law of Z.**

According to Article 2.2, when the EAW is issued for the prosecution of one of t**he listed thirty-two offences** and that this offence is punishable by **at least three years of imprisonment**, it shall give rise to surrender without verification of the double criminality of the act. It means that the executing authority does not have to verify that the offence for which the arrested person is suspected is provided for and restricted by its national law. Conversely, when the EAW is issued for offences other than those listed in Article 2.2, Article 2.4 states that the executing authority may proceed with a **verification of the double criminality** of the act, whatever the constituent elements are or however the offence is described.

In Paul's case, the facts are considered as unlawful coercion by the public prosecutor in Member State Z. As it is not one of the listed thirty-two offences, the executing authority may proceed to check for double criminality. In other words, the judge in Member State Y may check whether the facts of "laying on top of Caroline, holding her arms, spreading her legs and trying to have unprotected sex with her" can fall under the criminal law of Member State Y even if the constituent elements are not the same or if the incrimination would not be exactly the same as in State Z:

– if it is assumed that those facts fall under Y's criminal law, Paul will be surrendered to Member State Z. In other words, **it is not relevant for Paul to deny that facts do not amount to a criminal offence under the law of Y.**

– On the other hand, if it is assumed that those facts do not fall under Y's criminal law, the judge in Member State Y will be able to refuse to execute the EAW and Paul will not be surrendered to Member State Z. In other words, **it is relevant for Paul to deny that the facts do not amount to a criminal offence under the law of Y.**

QUESTION 1-B

While having protected sex with vaginal intercourse, the condom got torn. Nevertheless, Paul kept on and ejaculated. Member State Z's public prosecutor considers this as sexual molestation. Paul says it is not a criminal offence because firstly, Caroline agreed to sexual intercourse and then she never claimed that Paul knew the condom got torn.

Concerning the relevance of Paul's argument with respect to the EAW, the same reasoning as

previously explained has to be made on the distinction between conditions on the issuing and conditions on the execution of the EAW. Therefore Articles 2.1, 2.2 and 2.4 apply too. Since there should not be any verification of the issuing terms of the EAW, **Paul's argument that facts do not fall under the law of Z is not relevant.**

However, his argument that facts do not fall under the law of Y either is more interesting and deserves to be developed. Indeed, similarly to what was previously said about the execution of the EAW concerning unlawful coercion, sexual molestation is not one of the thirty-two offences listed in Article 2.2.

Therefore, executing Member State Y may check the double criminality of the facts. This means that the judge may check whether "keeping on the sexual vaginal intercourse while the condom got torn and knowing that Caroline only agreed to have protected sex" can fall under Y's law. In any case, as we do not know the content of Y's criminal law, we will only be able to make mere hypotheses on whether or not Y's judge should or should not execute the EAW. But since Y is a Member State of the European Union, we assume that applying Article 6 of the Treaty on European Union stating that the Union respects fundamental rights such as declared in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR") and in the Charter of Fundamental Rights of the European Union, Member State Y is part of the ECHR and implements the European Court of Human Rights' case law. To that respect, we may quote the case *K.A and A.D v. Belgium* (17th February 2005) that put **emphasis on the consent** of the person involved in a particularly dangerous sexual activity, consent which does or does not allow for the definition of the offence. Generally, it seems that criminal law in several EU Countries, deems consent as a **key element in the accusation of sexual molestation**. For example, the French Criminal Code defines sexual molestation as any sexual act undertaken with violence, constraint, threat or surprise (Article 222-22 and 222-23).

In our case, Caroline's consent and Paul's awareness have to be discussed. We know she agreed to have sexual intercourse with Paul but only if he used a condom. In other words, it results from the fact that she insisted on them having safe sex, and that she did not agree to have unprotected sex. Yet, Paul did not stop the intercourse when the condom got torn. Therefore the first question asked is: was Caroline's consent clear enough ? And the second one is: was Paul aware that the condom got torn ?

From the above statements, it can be highlighted that Caroline's wish to have protected sex is clear (the fact that she wants Paul to do an HIV test shows it as well). But Paul's knowing about his condom's "state" is not displayed in Caroline's deposition. Besides, Paul denies it and it would be rather difficult to assess whether he could have been able to realize that his condom was torn.

Therefore, if Y's judge considers that Paul was aware of the tear, Paul could be charged with sexual molestation, the double criminality would be verified and the EAW would be executed. On the contrary, if Y's judge considers that Paul was not aware of it, it would be harder to charge Paul with sexual molestation, the double criminality test would fail and the judge could decide not to execute the EAW. In conclusion, **Paul's defence can be considered relevant.**

QUESTION 1-C

Paul is charged with rape by having sex (vaginal intercourse) with Caroline while she was asleep and then half asleep, without using a condom. Paul's lawyer argues that the facts related to this charge do not amount to "rape" in the sense of the Framework Decision on the EAW. The question is to determine if a verification of the characterization of the offence made by the issuing State is possible. To tackle this problem, we have to examine two points: firstly, the definition of the offence, and then the characterization of the facts by the issuing State.

Concerning the definition, the Framework Decision does not define the thirty-two offences that are listed. However, it results from Article 2.2 that it is the issuing State's responsibility to define the offence according to its national law. Indeed, it states that "*The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years* ***and as they are defined by the law of the issuing Member State****, shall [...] give rise to surrender (...)*". Among the list of the thirty-two offences, this article mentions rape.

In our case, the issuing judicial authority ticked the box referring to *rape* in table e).

Therefore, rape shall be defined according to the law of Z (issuing Member State) and Member State Y is not entitled to check the definition of the alleged offence.

Concerning the characterization of the facts, Paul's lawyer could still argue that it does not comply with the issuing State's definition. In a case held by the French Cour de Cassation on 21st November 2007, it was stated that "*when Article 2.2 applies, the legal characterization of the facts falls under the exclusive jurisdiction of the judicial authority of the issuing State,* ***except in case of manifest error of assessment of the facts***". This means that the executing State can only check the characterization of the facts when it considers that there is a very obvious mistake.

In our case, **we assume that there is no such mistake** since having sex with a person who is asleep and then half asleep seriously calls into question the existence of the person's consent (which is the key element concerning sexual offences, as we previously said). Indeed, national courts have held that there is no consent when sexual intercourse occurs when the victim is asleep

or drowsy[2].

In any case, we think that the French Cour de Cassation case law is contrary to the spirit of the Framework Decision on the EAW. Indeed, checking the characterization made by the issuing State would infringe the principle of mutual recognition, which is the basis of the EAW Framework Decision (Article 1.2).

To conclude on this point, we assume that the executing State cannot check the characterization made by the issuing State.

Finally, we can say that Paul's argument seems irrelevant because there is absolutely no possible verification by the executing State of the definition and the characterization of the offence of rape indicated by the issuing Member State.

QUESTION 2-A

Paul has not consented to his surrender to Z and claims that this is perfectly legal. Hence, is the defendant's refusal to voluntarily attend a hearing in a foreign country perfectly legal ?

The EAW FD provides for various provisions related to the consent or the refusal of the requested person to be surrendered to the issuing Member State. Indeed, Article 11, which lists the rights granted to this person, states that the executing authority must inform him or her *"of the possibility of consenting to surrender to the issuing authority";* given that consenting to the surrender is **only a genuine faculty,** and not an obligation, it is totally possible for the person sought to refuse to attend a hearing in the issuing country. Furthermore, Article 13, which is wholly dedicated to the question of the consent to surrender, ensures that consent must be *"expressed [...] voluntarily and in full awareness of the consequences"* ; it must be collected and recorded in compliance with the national procedure (Article 13.2). Therefore, if consent has to be given expressly and in compliance with certain requirements of form, it is only an option for the requested person who must show his or her choice with no possible doubt (Article 13.3).

Besides, the EAW FD not only foresees the possibility and conditions under which consent or refusal has to be expressed, **but also provides for the consequences of such refusal.** Indeed, Article 14 states that when the requested person refuses to be surrendered, he or she has the right to be heard by the executing judicial authority. Moreover, pursuant to Article 17, the deadlines to execute the warrant vary depending on the consent or the refusal of the person sought (Article 17.2 and 17.3).

[2]TGI Rouen, 19th January 2007

Thus, according to the EAW FD, it is utterly possible and legal for Paul to refuse to attend a hearing in Z. However, his refusal will in no way impede State Y to execute the warrant: it will only modify the procedure and its consequences.

Moreover, Paul argues that the European Arrest Warrant issued against him is too serious a measure in comparison to the alleged offences, and that, consequently, the principle of proportionality has been infringed. He sustains that his hearing must be carried out by resorting to other instruments. Is there such a principle of proportionality regarding the EAW ? Is it possible to use other legal tools of mutual legal assistance in criminal matters ?

The EAW FD does not contain any reference to a **proportionality check** granted to the executing Member State, which **cannot raise it as a ground for refusal**. Indeed, the issuing authority is the only one to assess whether or not an arrest warrant is appropriate in a peculiar case. However, this state of affairs has been harshly criticized by doctrine and by the European institutions, which regret the abuse of arrest warrants in ridiculously small cases. Indeed, the Council Handbook on how to issue a European arrest warrant (revised version of 3-4 June 2010) recommends the issuing authority **to assess the proportionality of the warrant on the basis of several criteria**, among which the seriousness of the offence, the possibility of the suspect being detained, and the likely penalty imposed if the requested person is found guilty of the alleged offence. Those elements do not all have to be met but are only clues helping the issuing authority to assess the proportionality.

In Paul's case, **these criteria are very likely to be fulfilled:** the seriousness of the offences is characterized, given that Paul is suspected of three sexual offences (in particular for a rape, which is so serious that it is mentioned in the list of the thirty-two offences of Article 2.2 EAW FD) ; this latter offence is punishable by a maximum of eight years of imprisonment, whereas the threshold to issue an arrest warrant is only a one-year custodial sentence; and finally, as we ignore whether the suspect can be detained, we can assume, due to the gravity and nature of the alleged offence, that State Z's law foresees such a possibility.

Therefore, even if proportionality were a mandatory condition to issue a European arrest warrant, it would be satisfied in Paul's case: thus, Paul's claim is irrelevant.

To be certain that the use of a EAW is not disproportionate, the issuing authority must, in compliance with the Council Handbook on EAWs, **check whether less coercive measures could be sufficient to achieve the goal pursued.** In the case in hand, could such alternatives consist in

issuing a European Evidence Warrant, resorting to a videoconference, or issuing a letter of request ?

– Pursuant to Article 4.2 (a) of the Council Framework Decision of 18 December 2008 on the **European Evidence Warrant**, such a warrant cannot require the executing authority to take statements of suspected persons.

– Similarly, the Mutual Legal Assistance Convention of 29 May 2000 states that **hearings by videoconference** involving an accused person can only be carried out if several conditions are satisfied: the agreement of the suspect and of the concerned Member States has to be reached, and the transport of the person to the territory of the issuing Member State has to be impossible or undesirable (Article 10.1 and 10.9). In Paul's case, those conditions are not fulfilled because the transport of the suspect is not impossible.

– Finally, a **letter rogatory** could be issued, according to Article 4 of the MLA Convention, in order to ask Y's authorities to carry out a hearing; nevertheless, this solution would not be efficient, since no binding deadlines are imposed on the executing Member State and the procedure is cumbersome.

Consequently, neither a European Evidence Warrant nor a videoconference or a letter of request could replace a European Arrest Warrant in Paul's case: **those measures would not be legal or appropriate,** all the more so since they do not aim at conducting prosecution or executing a judgement, but at gathering evidence. **Therefore, Paul's argument is not relevant.**

QUESTION 2-B

After the issuing of the EAW, Paul was arrested in Member State Y. However, the public prosecutor in Member State Z has not yet taken the decision as to whether Paul should be prosecuted or not. According to Paul's lawyer, the EAW Framework Decision requires that such a decision has already been taken. The question is to determine whether the issuing of an EAW is possible if the suspect has not been formally prosecuted yet.

Article 1.1 of the EAW FD specifies that "*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*". The underlined expression does not answer the question clearly in itself, as "*conducting a criminal prosecution*" does not imply that prosecution has to be already decided. However, this expression seems to refer to a flexible process and not to a decision of

prosecuting someone. This article in **the French version of the EAW FD** states that the surrender can be made "*pour l'exercice de poursuites pénales*". The word "*exercice*" also seems to involve a degree of flexibility, as the Framework Decision does not use the word "*exécution*". Similarly, **the Spanish version** uses the expression "*ejercicio de acciones penales*".

Moreover, Article 5.3 of the French version of the EAW FD, that allows for the return of the person to the executing State after the being heard, refers to the passing of the sentence using the conditional tense. This shows that surrender is possible even though the conviction is not certain and even though the person is not charged yet.

However, **some States do not have the same interpretation** of these articles. For instance, in several cases, the United Kingdom and Ireland have refused to execute an EAW because there was no certainty that the suspect would be charged during the hearing (recent example: Irish Supreme Court, *Minister for Justice Equality and Law Reform v. Bailey*, 1st March, 2012). Nonetheless, **it is important to note that those decisions mainly refer to national legislations**, such as the Irish European Arrest Warrant Act 2003[3] and not to the EAW FD. Yet, in our case, the two countries have implemented the Framework Decision and do not contain any national legal statement different from the ones existing in the EAW FD.

According to our literal interpretation of the Framework Decision, we assume that the latter does not require that the suspect will be prosecuted with certainty. This interpretation is confirmed by Judge Murray in the *Bailey Case*. He wrote that "*the Framework Decision does not make it a pre-condition to surrender that the requesting state has made a decision "to try" the requested person"*.

Moreover, it shall be noted that this situation is frequent in the European Union. Indeed, a certain number of Member States have an inquisitorial criminal procedure with investigating judges (France, Spain,...) that can indict the defendant even if there is uncertainty concerning the bringing into court of the defendant. Requiring such a certainty for the issuing of an EAW would hinder many national criminal procedures and, as a consequence, criminal cooperation in the EU.

To conclude on this point, if uncertainty persists, **we consider that the Framework Decision should be interpreted as allowing the surrender of a person who has not been prosecuted yet, but who is only suspected.**

In our case, the public prosecutor in Member State Z has not yet taken the decision as to whether Paul should be prosecuted or not. However, the person is clearly charged with three offences. Paul was notified to travel to Z for formal interrogation. A national warrant and then an EAW were issued. So the EAW has been issued for the purpose of conducting a criminal

[3] It states in Section 21A that "*the High Court shall refuse to surrender the person if it is satisfied that a decision has not been made to charge the person with, and try him or her for, that offence in the issuing state".*

prosecution, on the basis of specified charges.

Therefore, we consider that the EAW was issued for purposes of conducting a criminal prosecution. **Thus, it fulfils the conditions related to Article 1.1 of the EAW FD. In conclusion, Paul's argument is irrelevant.**

QUESTION 3

Paul is a citizen of EU Member State X, but he has been living and working in EU Member State Y for more than 12 years. He sustains that in the case that he is transferred to EU Member State Z, he would benefit from a certain privilege foreseen by Y's law for Y's citizens: he would be transferred to Z to be heard, and would afterwards be returned to Y. However, Y excludes non nationals from this privilege. Is this exclusion discriminatory ?

According to Article 5.3 of the EAW FD: *"where a person who is the subject of a European arrest warrant for the purposes of prosecution i**s a national or resident** of the executing Member State, surrender may be subject to the condition that the person, after being heard, is retuned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State".*

In our case, Paul is a resident of Y since he has been living in Y for more than 12 years.

Therefore, he could normally rely on this provision in order to be returned to Y after the trial.

However, contrary to what is asserted in Article 5.3, Member State Y reserves this particular privilege to its nationals: the conformity of this point to EU law needs to be examined.

Article 18 of the Treaty on the functioning of the European Union affirms the **principle of non-discrimination on grounds of nationality**: it prohibits any difference in treatment between the nationals of a Member State and the nationals of other Member States, which would not be objectively justified. Similarly, Article 21.2 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter) prohibits any discrimination on grounds of nationality.

In our particular case, Paul, as a national of X, is not granted the right to benefit from this privilege, which is specific to nationals of Y and which automatically excludes non-nationals. However, no objective justification legitimises this difference in treatment, because Paul, like the nationals residing in Y, lives in Y and is entitled to the right to private and family life (pursuant to Article 8 of

the European Convention on Human Rights and Article 7 of the Charter).

Besides, examining the CJEU's constant case law on Article 4.6 EAW FD is helpful to assess the compliance of Y's law with EU law. Article 4.6 allows the executing Member State to refuse to execute the arrest warrant related to one of its nationals or residents, when the arrest warrant has been issued to execute a sentence, if this State accepts to execute the sentence on its territory. This provision is very similar to Article 5.3, which allows the executing State to surrender its national or resident provided this person will come back to serve his or her sentence on its territory. In case C-66/08 *Kozlowski* (17 July 2008), the CJEU considered that the term "*resident*" in Article 4.6 was an autonomous notion of European Union law, and had to be defined uniformly in all Member States: this concept is, in the Court's case law, related to the degree of integration in the society of the Member State the person lives in (Case C-123/08 *Wolzenburg*, 6 October 2009). Hence, **the CJEU has listed some objective criteria on the basis of which a person can be considered as a resident**: to assess if the requested person is a resident of the executing Member State, the executing judicial authority should take into account *"the length, nature and conditions of his presence, and the family and economic connections which he has with the executing Member State"*. (Case C-42/11 *Pedro Lopes Da Silva Jorge versus France,* 5 September 2012 ; *Wolzenburg* ; *Koslowski).*

In our particular case, these criteria seem to be met: Paul has been living on Y's territory for more than twelve years, and thus satisfies the condition of length. We know nothing about Paul's family, but we do know that he has been working in Y all this time, so the condition related to the economic connections to the executing Member State is equally satisfied.

Therefore, Paul can be deemed a resident of Y: he has demonstrated a certain degree of integration in Y's society. Consequently, the national provision which excludes automatically and absolutely the nationals of other Member States, irrespective of their links with Y, infringes both the principle of non-discrimination and the right to private and family life. That is what the CJEU held in the *Pedro Lopes* case, related to Article 4.6 of the EAW FD.

To conclude on this point, **Paul is right in stating that it is discriminatory to exclude other EU nationals living in Y from this privilege**.

Given that national courts, according to case C-105/03 *Pupino* (16 June 2005), must interpret their national law in light of the wording and the purpose of the framework decision, our court should interpret our national law in compliance with Article 5.3 EAW FD, and thus extend this privilege to Paul, so as to avoid any infringement of EU law.