This note aims at analyzing the relevance of the arguments Paul's defence lawyer has put forward in order to sustain his point of view that Paul should not be surrendered to Member State Z.

**I- Arguments in relation to the charges**

*a- Facts related to unlawful coercion and sexual molestation*

**Defendant's position:** the defendant claims that facts related to Charge (1) -that is to say the fact that Paul lied on top of Caroline, held her arms, spreading her legs and trying to have unprotected sex (vaginal intercourse) with her- do not, as a matter of law, amount to a criminal offence, both under the law of Y and the law of Z. He also claims that facts related to Charge (2) -consummating intercourse and ejaculating although the condom had torn on the same occasion- do not constitute a sexual molestation, both under the law of Y and the law of Z.

**The defendant argument is mainly that they do not meet the *double criminality test*** (= the executing Member State checks if the acts for which the EAW considered to be an offence by the EAW were or not punishable by its own law). In the defendant's opinion, the acts for which the EAW has been issued do not constitute an offence both under the law of Z and the law of Y and therefore neither of the offences described in the EAW pass the test thereof, on grounds to be scrutinized below.

**Analysis about the relevance of this argument:**

In the Framework Decision of 13 June 2002 on the European arrest warrant (EAW), there are two categories of offences, described in article 2. The verifications for executing a EAW are not the same depending on the category they belong to:

- *the Framework list offences (article 2.2 of the Framework decision)*: They belong to the range of offences catalogued in article 2.2 and are punishable by the issuing State with a maximum custodial sentence or detention order of at least three years. If both these conditions are met, the executing state cannot refuse the surrender under the argument that it does not recognise the offence as a crime under its jurisdiction – the principle of mutual recognition takes precedence.

- *the non-listed offences (articles 2.1, 2.4 of the Framework decision)*: For other offences that are punishable by the issuing state with a maximum custodial sentence or detention order of at least 12 months, states may or may not retain the double criminality check, according to their will, depending on the constitutive elements of the act and their description.

The Framework decision has been implemented in Y law by a subsequent domestic Act[1]. The Implementation Act is a mere transposition of article 2.1 and 2.2. Consequently, the Act contains the article 2.2 Framework Decision catalogue. In this act, other offences are subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described.

Unlawful coercion and sexual molestation are not Framework offences since they are not listed in Article 2.2 of the Framework Decision. Consequently, the double criminality test applies. The double criminality test requires an analysis of factual elements in order to determine if there is or not an offence under the law of Y.

In order to do such an analysis, it is necessary to select the relevant facts[2] that have to be taken into account in that perspective: should it be restricted only to those mentioned in the EAW (that is to say, the three charges) or to those communicated to domestic judicial authorities (that is to say, the plaintiff's statements to the police)?

The content of the EAW shall be sufficient by itself since "*the mechanism of the EAW is based on a high level of confidence between Member States*" *(Framework Decision, preamble, 10)* and "*Member States shall execute any EAW on the basis of the principle of mutual recognition*" (*Framework Decision, article 1.2*). Furthermore, according to article 8 of the Framework Decision, the EAW shall contain a description of the circumstances in which the offence was committed, including the time, place and degree. This is all that is needed by the executing judicial authorities. Therefore, they do not need anything else.

1 *cf. addendum*

2 *cf. addendum*

Consequently, extra-EAW materials (such as the plaintiff's statements to the police) cannot be used to pass the double criminality test.

*Analysis of factual elements regards to charge (1) – unlawful coercion*

The EAW states that Paul had committed unlawful coercion by lying on top of Caroline, holding her arms, spreading her legs and trying to have unprotected sex (vaginal intercourse) with her. This attempt to force sexual intercourse is liable to penalty under the law of Y. Therefore, there is no objection to the execution of the EAW on this ground.

**Regards to charge (1) – unlawful coercion, the double criminality test is successfully fulfilled and therefore this argument of the defendant is irrelevant.**

*Analysis of factual elements regards to charge (2) – sexual molestation*

The EAW states that Paul has committed an act of sexual molestation by consummating intercourse and ejaculating although the condom had torn on the same occasion. Such a behavior by itself is not liable to penalty under the law of Y. Under the law of Y, an intentional element is required in order to incriminate someone. Indeed, the very fact of consummating intercourse and ejaculating although a condom had torn on the same occasion does not constitute by itself an offence.

And neither do the facts reported in the EAW, by themselves, demonstrate the plaintiff's lack of willingness. Indeed, the mere fact that a protected intercourse occurred between the plaintiff and the defendant – *according to the sole provisions of the EAW* - does not imply that any unprotected intercourse would have necessarily been refused by the plaintiff.

In the EAW itself, there is no reference to such an element or to specific circumstances that would characterize the lack of willingness. Even if taking into account the plaintiff's own statements, it is undisputed that she agreed to have sex with Paul. But it is also clear that it was only on condition that he wore a condom. The lack of willingness should be understood here as a lack of willingness to have unprotected sex. It seems that Paul takes this will into account by using a condom from the start of the sexual intercourse.

As such, taking or not into account the external material of the EAW settles the case, regarding this specific issue.

**Regards to charge (2) – sexual molestation, the double criminality test is not successfully fulfilled and therefore this argument of the defendant may be considered as relevant.**

*b- Facts related to rape*

**Defendant's position:** The defendant claims that facts related to Charge (3) -that is to say the fact that he had sex (vaginal intercourse) with the initially-sleeping and then half-asleep Caroline without using a condom on the 18th do not amount to "rape" in the sense of the Framework Decision on the EAW.

**Analysis about the relevance of this argument:**

According to article 2.2 of the Framework Decision, rape is listed as a Framework Offence but not defined. Indeed, there is no definition of the offences listed. The Annex of the Framework Decision states that "*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*". It should be remembered that the very basis of the article 2.2 list lies in the mutual trust principle. It is assumed that EU Member States share the idea that a sexual intercourse requires the consent of both individuals. That is why rape is mentioned as a Framework Offence. Indeed, all the Member States thereby share the same idea that a lack of consent is a constituent element of rape.

Since Member State Z's judicial authorities have considered that Paul committed a rape, there is a rape according to Z law. That is the mutual trust principle. As a rape is punishable, in Z law, by up to 8 years due to it being considered serious, it is legitimately considered as a Framework offense, since rape belongs to the range of offences catalogued in article 2.2 and is punishable by the issuing state with a maximum custodial sentence or detention order of at least three years. That's why, in the EAW issued against Paul, the issuing judicial authority ticked the box referring to rape in table e). And therefore, it is useless debating over the sense of the definition of the Framework Decision since there is no definition in the Framework Decision.

Anyway, the facts stated in the EAW do no challenge the idea that there was a debate on the lack of consent of Caroline. Indeed, the consent is not demonstrated by the fact that she woke up and did not resist to Paul since he penetrated her when she was asleep. As a result, she was unable to express her will at the very moment of the penetration. There was an obvious violation of consent. All those elements provide sufficient grounds to ensure that there is no misappropriate use of the box ticked.

**Regards to charge (3) – rape, the defendant's position is irrelevant since there is no definition of the rape in the Framework decision.**

II- Arguments in relation to the issuing of the European Arrest Warrant

*a- The proportionality argument*

**Defendant's position:** The defendant asserts that the issuing of the European Arrest Warrant was a sort of retaliative response to his *legal* refusal to travel to Z for the formal interrogation notified by the Z public Prosecutor. Consequently, he considers the issuing thereof to be *disproportionate*, since he could have been properly interrogated in Member State Y.

**Analysis about the relevance of this argument:**

One has to agree with the defendant that european Mutual Legal Assistance instruments provide appropriate tools that would have made the defendant's hearing on territory Z possible. According to Article 10 of the *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, Member State Z could have judicial authority to proceed to Paul's interrogation in Member State Y by videoconférence. Article 10 relates to a person who has to be heard as a witness or expert. Furthermore, Article 10.5 stresses that « *the hearing shall be conducted directly by, or under the direction of, the judicial authority of the requesting Member State in accordance with its own laws* », which ensure that all conditions necessary for the interrogation to be as formal as required by Z law could have been fulfilled. Provisions also exist about the hearing of witnesses and experts by telephone conference (article 11).

On account of this, it can be therefore agreed with the defendant that the issuing of the European Arrest Warrant might not be *proportionate*. And, even if there is no explicit provisions in the bindings articles of the Framework Decision, the principle of proportionality

is directly referred to by the recital 7 of the Preamble and by undirectly by The Charter of Fundamental rights, through the combination of Article 6 TEU and Article 1 of the Framework Decision.

Nonetheless, the *proportionality check* should be taken into account by the issuing Member State *before* the European Arrest Warrant is issued, and not by the executing Member State afterwards. The judicial authorities should apply this 'proportionality check' by considering the seriousness of the offence, the length of sentence and the costs and benefits of executing an EAW.

As observed by the European Commission in its Report on the *Implementation of the Framework Decision of 13 June 2002* (COM(2011) 175 final, 11 april 2011), it would result from the appliance of a proportionality test by the executing judicial authorities *« a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based* ».

It must be assumed indeed, according to the mutual trust principle, that the judicial authorities of Member State Z have submitted the issuing of the EAW to a proportionality check. As a matter of fact, the EAW was issued after a national arrest warrant was issued by a national court, that could only have been founded on the strong suspicion that the defendant had indeed committed the offences. Furthermore the court also stated that the defendant's refusal to return to Z was equivalent to fleeing and non-cooperation. It is likely that all these circumstances had been taken into account before issuing the European Arrest Warrant.

In any case, if the judicial authorities of Member State Y decided to check the proportionality of the EAW issuing, it would challenge the legitimacy of the decision taken by the Court of Member State Z. It would as such undermine the effectiveness of the principle of mutual trust.

**As a consequence, no matter how the defendant's argument may appear, it shall not be sustained.**

*b - The preliminary prosecution argument*

**Defendant's position:** The defendant claims that the European Arrest Warrant should have been issued after a decision of prosecution was made, which was not the case since no formal decision to bring him before a court was taken by Z Member State judicial authorities.

**Analysis about the relevance of this argument:**

According to article 1 of the Framework Decision, as implemented under the law of Y, "*the European Arrest Warrant is a judicial decision issued by a Member State with a view to 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***".

Strictly speaking, a *prosecution* only refers to proceedings against someone in respect of a criminal charge. In a broad sense, prosecution may also cover preliminary investigation conducted towards a suspected person. The question is about the true meaning of the provisions of the Framework Decision ?

On the one hand, it can be asserted that since no distinction has been made between pre-charge investigation and post-charge prosecution, a comprehensive conception of the prosecution should be adopted to comply with the diversity of criminal procedure among European Member States. On the other hand, one could also argue that the Framework decision does not provide a means to conduct investigations abroad, since European instruments of cooperation do exist in that field. What is more, using the EAW in order to overtake the limitations of existing instruments might be considered as an abuse of power.

In this case, the defendant is requested by Member State Z for the purposes of conducting a criminal prosecution. It cannot be estimated that he is an accused person as such. But, because a national arrest warrant on which the European Arrest Warrant was issued by the national Court, it is clear that the public prosecutor has identified him as the perpetrator of criminal offences which are clearly set out in the European Arrest Warrant. The purpose of prosecution is then the arrest and surrender of a requested person, as provisioned in Article 1.

Neither the provisions of the Framework Decision nor the Implementation act require that a formal decision of charging the person subjected to the warrant should be taken. The only reservation is that the Warrant shall be issued « *in the purpose* » of prosecution. The restricted purpose clearly prevents the EAW to be issued in the exclusive purpose of conducting an investigation act — such as questionning a suspect. But the « purpose » perspective allow the issuing state member to issue the warrant, so far as judicial authorities have the intention of conducting a prosecution towards the subject of the warrant.

**According to the mutual trust principle, the issuing of the European Arrest Warrant is sufficient by itself to consider that the purpose of prosecution is set up. It does not imply**

**that the decision about the prosecution has to be taken, contrary to what the defendant argues.**

**III- Arguments in relation to the consequences of a potential execution**

**Defendant's position :** The defendant's position is that the it is discriminatory to exclude other EU nationals living in Y from the privilege of returning to Y after the trial while it is a guarantee offered to Y's nationals. As a consequence of this deprivation of privilege, he should not be surrendered to member state B.

**Analysis about the relevance of this argument :**

1) Article 5 of the Framework Decision provides that the execution of the European Arrest Warrant by the executing judicial authority 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 again him in the issuing Member State, even if the person subject of a European Arrest Warrant is a resident.

This privilege stems from his right to private and family life enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Because the defendant resides in Y for 12 years, it is very likely that many of his relatives live in Y. Should he be convicted for the facts he is charged for, the practical possibility to exercise his right to private and family life would thereby be more effectively guaranteed if if was kept in custody in Y. Mostly because it would then be easier for him to receive visits in detention on Y territory than in Z territory. Furthermore, the perspective of increasing the requested person's chances of reintegrating into society when his sentence expires is also to be considered. For those reasons, the defendant may allege a strong interest for being detained in Y rather than in any other Member State, including Z.

2) According to the defendant, the privilege of article 5.3 has been granted to Y nationals only. He is then deprived of this privilege, despite the fact that he is a long time resident of Y.

According to Article 18 of the Treaty on the functioning of the European Union "*within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*". The principle of

non-discrimination is of direct effect in EU law. However, a difference in treatment based on nationality is possible but it must be objectively justified, proportionate to the objective pursued and must not go beyond what is necessary to achieve that objective.

Thus, according to the case law of the Court of Justice of the European Union, a difference of treatment between nationals of the executing Member State and nationals of other Member States with regard to refusal — under article 4(6) provisions — to execute a European Arrest Warrant is acceptable (see Case C-123/08 Dominic Wolzenburg: « *a national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC against national legislation, such as the OLW, which lays down the conditions under which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence* ». ), but **a Member State cannot restrict solely to its own nationals the non-execution of a European Arrest Warrant** with a view to enforce in its territory a custodial sentence imposed in another Member State (see Case C-42/11 João Pedro Lopes Da Silva Jorge). In other terms, regarding the provisions of article 4, the non discrimination principle fully applies. This very idea should equally apply to article 5(3) of the Framework Decision as implemented in the law of Y.

Indeed, both these Framework Decision provisions involve the location of custody, and both of them should be submitted to the same rules as regard to the non discrimination principle and right to a family life. Consequently, there is no legitimate ground to deprive the other EU nationals living in Y of the benefits of the provisions of the privilege thereof.

It then must be agreed with the defendant that it is discriminatory that Member State Y does not provide him the same guarantees because he is citizen of another EU Member State.

3) Therefore, acknowledging that the defendant is discriminated against in regard of this matter does not imply the European Arrest Warrant should be refused. At most shall he claim that the same privilege granted to Y nationals be also granted to him. Nevertheless, the mere fact that he is a resident cannot necessarily imply that he is entitled to take advantage of any automatic right his sentence in the executing Member State. He has to demonstrate a degree of integration in the society of Y comparable to that of a national.

The defendant's argument is partly relevant. Indeed, he may be subject to an unjustified discrimination but the remedy cannot be the refusal of the execution the European Arrest Warrant.

**ADDENDUM**

It is indispensable, in order to allow a proper decision on the case to consider other facts beyond the ones indicated in the practical case.

Firstly, in order to discuss the double criminality test, **it is indispensable to consider that the Framework decision has been implemented in the law of Y by a subsequent domestic Act** that transposes the article 2.2 Framework Decision list and states that other offences are subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described. **Without this act, we simply cannot apply the double criminality test.**

**Secondly, it is indispensable to determinate what circumstances are or are not in the EAW** since, because we argue, the content of the EAW shall be sufficient by itself. According to article 8 of the Framework Decision that the EAW shall contain a description of the circumstances in which the offence was committed, including the time, place and degree. We assume that the circumstances detailed in the EAW are the followings:

*Charge (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, on the 13th,*
*Charge (2) - sexual molestation by consummating intercourse and ejaculating although the condom had torn on the same occasion,*
*Charge (3) – rape by having sex (vaginal intercourse) with the initially-sleeping and the half-asleep Caroline without using a condom on the 18th.*