THEMIS COMPETITION

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INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

Italian Team:

Anna Lisa Marconi

Manuela Maria Lina Matta

Irene Sandulli

Trainer:

Julia Dorfmann

Il vaut mieux hasarder de sauver un coupable que de condamner un innocent.

(It is better to risk saving a guilty person than to condemn an innocent).

Voltaire

Answers to the arguments of Paul's defence lawyer about the practical case.

The Treaty of Lisbon, signed on 13 December 2007 by the 27 Heads of State and Government of the Union came into force on 1st December 2009 and, due to the changes made to article 6 of the Treaty on European Union (hereinafter, also referred to as "TUE", [1]), the Charter of Fundamental Rights of the European Union entered formally to become part of the Union legal sources, assuming the same value of the Treaties: therefore, such provisions are likely to have an immediate effect on the system of European legal sources.

The Treaty of Lisbon also abolished the entire pillar system and, as a result, the former third pillar Police and Judicial Co-operation in Criminal Matters (PJC) was absorbed into a consolidated EU structure.

Within the PJC, we know that in 2002 the Council Framework Decision of 13 June 2002 nr. 2002/584/JHA (hereinafter, also referred to as "FD") on the European Arrest Warrant (hereinafter, also referred to as "EAW") and the Surrender Procedures between Member States was enacted.

Such a legal instrument replaces the extradition system by requiring each national judicial authority (the "executing judicial authority") to recognize, *ipso facto*, and with a *minimum* of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the "issuing judicial authority").

EAW certainly falls within the measures of judicial cooperation in criminal matters having a cross-border dimension and its regulatory system, entered into force on 1st January 2004, is applicable to the case, even in the amended version.

In order to analyze the defence arguments of Paul, we shall consider that EU Contries X, Y and Z all implemented the abovementioned Framework Decision in their legal systems, without legal statement different from the one set in the FD, and that the integral contents of the Lisbon Treaty are fully applicable in the involved Member States.

In this normative scenario, our analysis shall focus not only on the regulatory system of the FD, but also on the general principles concerning both the safeguard of human rights, governed by the Treaty of Lisbon, and on that of mutual recognition, which is regulated in general by article 82 of the Treaty on the functioning of the European Union, pursuant to

[1] Under which, "*The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union. (...)Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*"

which "*Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83*".

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As a fundamental premise, we assume that the Prosecutor may be considered an "issuing judicial authority", corresponding to the definition set out by article 6.1 of the FD ([2]). This disposition actually leaves to the individual Member States the task of determining the judicial Authority responsible for issuing (or executing) a EAW.

We can also support, firstly on a literal criterion, that the intention to restrict the power to issue an EAW or to participate to its execution only to a judge should have been expressly stated: in such a perspective, the lack of a precise definition (referring the abovementioned rule, in general, to the "issuing judicial Authority) shall be intended as to accommodate a wider range of Authorities.

A different interpretation would be radical and would prevent public prosecutors from performing functions that they already have been performing in relation to the issue of provisional arrest warrants since 1957, reminding to this purpose that the FD provisions (article 31 par. 1), from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States.

We shall also consider that, in several Member States, non judicial central Authorities continue to play a role in cardinal features of the surrender procedure, so that criticizing the use of the Prosecutors as "judicial Authorities" would be difficult to reconcile with the letter and the spirit of the FD, which introduces a precious instrument of cross-border cooperation.

Furthermore, the European Council went on to call on Member States to provide "judges, prosecutors, and judicial staff" with appropriate training on the EAW: this is a clear inference that there are no reasons to prevent the Prosecutors performing the role of issuing judicial Authority ([3]).

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1A: First of all, we shall consider that the crime named as "unlawful coercion" does not fall within the crimes listed in article 2, par. 2 of FD.

[2] Art. 1 par. 1, "*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*". Art. 6 par. 1 "*The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State*".

[3] See, for the above considerations, also UKSC 22 on Appeal from: EWHC Admin 2849 Assange (appellant) v. The Swedish Prosecution Authority (Respondant).

The named provision contains a list of offences which "*shall, under the terms of this Framework Decision and <u>without verification of the double criminality of the act</u>, give rise to surrender pursuant to a European arrest warrant…* 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 <u>as they are defined by the law of the issuing Member State</u>*".

From the description of the case, we only know that the Prosecutor, applying for the EAW, signaled in table E the box "rape", crime for which dual criminality is not required.

At the same time, we cannot know if in the empty spaces of the Annex E, the Prosecutor signaled any other criminal offences apart from "rape", in which the "unlawful coercion" could be included to the purpose of our analysis.

In the absence of specific evidence to the contrary, we do not know if the selection of "rape" was referring only to the charge 3 (actually constituting "rape", as we will see later).

In order to evaluate if the charge 1 may justify the surrendering pursuant to article 2, par. 4, we should know whether the facts (named as "unlawful coercion") amount to a criminal offence both under the law of Y and under the law of Z.

Nevertheless, the description of the practical case does not offer any useful element relating to this matter.

Anyway, from the overall description of the facts, we may underline that, while Caroline agreed to have only protected sex (as we can argue since they before had "kissed and undressed"), Paul forced Caroline to endure his restricting her freedom of movement, and clearly used physical violence against her, trying to have unprotected sex even after her refusal (as we can infer from the expression "she resisted and insisted for the use of the condom").

The conduct charged to Paul (use of physical violence and attempt to have unprotected sex), if seen in the abstract, concerns a very serious offence both in objective and subjective terms, that is likely to constitute a crime in every European legal system (following the criterion of *id quod plerumque accidit*; for istance, it would be "private violence" in Italian law-system, article 610 criminal code).

It follows that we cannot share the argument of Paul's defence.

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1B: As far as this argument is concerned, we must consider that we do not know if, in the concrete case, Paul noticed, or was aware, of the rupture of the condom, consequently we cannot know about his effective lack of willingness.

To this purpose, pursuant to article 2, par. 4, for offences other than those covered by par. 2, (double criminality), "*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*".

We must consider that a criminal charge has not to include necessarily all the specific terms and conditions of the offensive conduct. On the contrary, it is sufficient that the conduct is described so as to allow its subsumption within the abstract case.

Therefore, we disagree with the defendant's contention.

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1C: We disagree with the defense.

The facts, as described in charge 3, constitute a "rape" (crime for which dual criminality is not required, see art. 2 par.2), since Paul deliberately consumed sexual intercourse with Caroline, by improperly exploiting that she, due to sleep, was in a helpless or unconscious state.

Moreover, it is an aggravating circumstance the fact that Paul was aware that using the condom was the expressed wish of Caroline and a prerequisite of sexual intercourse, still consumed unprotected sex with her.

It is also clear, from the comprehensive examination of the facts, that the injured party had only been prepared to consent to sexual intercourse with a condom.

On the contrary, there is no evidence to affirm that Paul reasonably expected that Caroline would have consented to sex without a condom.

Anyway, we cannot put in question the legal qualification made by the Prosecutor, when on the basis of a merely formal control, the charge in the abstract constitutes a crime of "rape".

In other terms, we cannot syndicate the criminal policy choices made by individual Member States, otherwise we would violate the existing principle of domestic jurisdiction in criminal affairs.

In fact, according to the EU case-law, the national judicial courts shall confine themselves to a merely formal control, verifying if the signaled fact, in the abstract, constitutes a criminal offence, regardless of the actual occurrence of the constituent elements of the offense itself; whereas, they can control and criticize exclusively macroscopic substantial violations of the criminal law, not occurring in this case.

We may argue this principle also from par. 10 of the FD, pursuant to which: " *The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on*

European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof".

Moreover, the assumption of mutual recognition is that all Member States have a sufficient store of guarantees which are shared, as it is implied by the common adherence to the ECHR, whose article 6 provides as follows:

" *1. In the determination of his civil rights and obligations or of any criminal charge against him, <u>everyone is entitled to a fair and public hearing</u> within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*

2.<u>Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.</u>

3.Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

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2A: In the abstract we could agree with Paul's defence, since a defendant's refusal to voluntarily attend a hearing in a foreign country is perfectly legal.

Nevertheless, at first the issuing Authority has already evaluated the need to hear Paul about the charges against him, with regard to the factual case and the seriousness of the conduct; furthermore, he has already issued that an arrest was necessary.

In this regard, the principles of mutual recognition and confidence between Member States set out in the FD require that the State of execution does not question the choices made by the

issuing Country, so as to ensure the superior and transnational principle of effectiveness of criminal law. To do otherwise would mean undervaluing the effectiveness of the principles on which the FD is based.

On the other hand, we shall respect the proportionality principle (invoked by Paul's defendant), under which the EAW discipline cannot go beyond what is strictly necessary in order to achieve that objective.

This principle is a cornerstone of the Framework Decision, in turn based to the principle of subsidiarity, as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community (see *considerandum* 7 of FD).

In concrete, the facts charged to Paul shall be considered enough serious, as they constitute not a mere trivial offense, but a serious criminal one, so that in balancing the different interests at stake, the interest of a defendant not to travel in a foreign Country is certainly secondary and lower than the State' s interest to contrast and punish such serious sexual crimes.

In conclusion, we cannot accept this argument.

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2B: We disagree with this defence.

On the basis of a literal interpretation of article 8 par. 1, letter c) of FD concerning contents and form for EAW issuing, we do not need a formal "request for judgment" (i.e.: the commencement of the prosecution), whereas a mere national *arrest warrant* is sufficient, or *any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2 of FD* (see the above-mentioned rule).

In this case, we already have this requirement, since the Prosecutor had before applied for a national arrest warrant at the competent national court in Z (*locus commissi delicti*).

If, on the contrary, we adhered to the defense thesis, the effectiveness of the EAW and the logic of UE cooperation itself would be frustrated.

Since in the different Member States the prosecution begins in different ways and at several moments of the criminal proceedings, if we subordinated the EAW issuing to the formal commencement of prosecution, the effectiveness of such an instrument of international cooperation would be undermined.

In this regard, the commencement of prosecution must be interpreted not in a merely formal way, but in a substantial one, in order to respect the logic of confidence and cooperation (see *considerandum* 10 of FD).

Moreover, in this case it is clear that the Prosecutor had all the useful elements to charge Paul with the crimes, even though he had applied just for questioning and not still wanted for prosecution: element, the latter, not expressly required by the already examined article 8, par. 1, lett. c).

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3A: From the description of the case, we know that Country Y formally grants to its nationals the privilege to transfer to the issuing Country only on condition that they will be returned to Y after the trial.

In our point of view, this warranty corresponds to the condition set out in article 5.3 of FD, pursuant to which "*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*".

We also know that Paul, despite being a citizen of the Country X, has been permanently living and working in the Country Y.

This means that the national rule of law of Y shall not apply, to the extent that limits this warranty only to its citizens.

As a consequence Paul, as a stable resident and worker in the executing Member State (Y), can invoke the wider European rule of law, which is clearly inspired to a non-discrimination principle.

We may infer this solution from a comprehensive reading of articles 3 and 9 of TUE, considering that pursuant to the first, "*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured …*" and pursuant to the latter "*In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship*".

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For the sake of completeness, it should be noted that Caroline's concern and the mere abstract possibility that she may have contracted the HIV after unprotected sex with Paul is not relevant for the present analysis.

In fact, the issuing of the EAW does not mention at all this eventually further existing injury of Caroline's sphere of legal interests in terms of physical and psychological integrity.

This case leads us to consider that, as a basic principle of the due process of law, in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given, if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.

Where evidence is obtained in consequence of an unlawful search, the judge has a discretion, not an obligation, to exclude the evidence; absent bad faith or fragrant and deliberate breach of one of the codes of practice issued, or some matter affecting the quality of evidence, the mere fact that evidence is discovered in the course of an unlawful search is unlikely to render the admission of the evidence unfair.

About proportionality, the European Court of Justice in its recent Decision of 9th November 2010, (Case C-92/2009 and C-93/2009) states that: "*article 52(1) of the Charter (of fundamental rights) accepts that limitations may be imposed on the exercise of rights such as those set forth in article 7 and 8 of the charter, as long as the limitations are provided by the law, respect the essence of those rights and freedoms and, subject to the principle of proportionality are necessary and genuinely meet objectives of general interests recognized by European Union or the need to protect the rights and freedoms of others. Finally, according to article 52(3) of the Charter, in so far as it contains rights which correspond to tights guaranteed by the Convention, the meaning and scope of thopse rights. Are to be the same as those laid down by the Convention. Article 53 of the Charter further states that nothing in the Charter is to be interpreted as restricting or adversely affecting the rights recognized inter alia by the Convention*".