

1. INTRODUCTION

The Treaty of the European Union states in article 67 that “*The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States*”. To such means, the traditional ways of cooperation within the EU have been replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within the aforementioned area of freedom, security and justice.

In effect, the cooperation mechanisms among the European Union Member States (hereinafter, the “Member States”) are now based on mutual trust, a guiding idea that allows the principle of mutual recognition between the European legal systems to come into full force. In this regard it is important to highlight that the Council Framework Decision of 13 June 2002, on the European arrest warrant and the surrender procedures between Member States (hereinafter, the “Framework Decision”), was the first instrument to implement the principle of mutual recognition of judicial decisions in criminal matters and to assume the existence of a high level of confidence and trust between the judicial systems of the Member States.

As we shall see while analyzing the questions of the case study, those key concepts of mutual trust, confidence and mutual recognition are reflected in the main aspects of the regulation of the Framework Decision and have had important practical consequences, some of which have not ended up being as positive as initially intended.

2. IN RELATION TO THE CHARGES:

It should firstly be noted that the Framework Decision establishes in articles 1 and 2 -and recitals 5, 6, 7 and 11 of its preamble- that once an European Arrest Warrant (hereinafter, the “EAW”) has been received by the competent judicial authority, its execution will be granted almost automatically, i.e. without the need for the receiving judicial authority to make a reassessment of the petition in order to verify that it complies with its own national law. Indeed, the purpose of the Framework Decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or judicial resolutions in criminal proceedings based on the principle of mutual recognition.

Such fast extradition process established by the Framework Decision is applied in relation to a list of broad categories of crimes that are established in article 2.2 of the Framework Decision. Thus, when an EAW is issued by the competent judicial authority of a Member State in relation to any of those criminal offences, the receiving judicial authority will not have to control the existence of a double incrimination, but will have to execute it as if it came from another judicial authority of its own jurisdiction.

Indeed, the reasons why the receiving judicial authority may deny the execution of the EAW requested in relation to the listed criminal offences are expressly set forth within article 3 of the Framework Decision, and they are straight forward and “objective” in the sense that the receiving judicial authority would not have to evaluate the grounds on which the requesting judicial authority has issued the EAW. As a consequence of this regulation, the traditional grounds for denying extradition have been removed between the Member States.

A.- Having said that, in relation to **charge (1)**, “unlawful coercion”, we should first note that it is not one of the criminal offences listed in article 2.2 of the Framework Decision.

Therefore, as established in article 2.4, the execution of the EAW could be granted depending on whether the facts of the case constitute a criminal offence according to the national law of the executing Member State. So if it does not constitute an offence under the law of Y, the Court of Y may refuse to execute the EAW issued by Z according to article 4.1 of the Framework Decision.

In this regard, the Prosecutor of Z considered that the facts related in count 1 consisting on “*Paul holding her arms, spreading her legs and trying to have unprotected sex (vaginal intercourse) with her on the 13th of March 2012*”, constitute an “unlawful coercion”. However, Paul’s defense counsel argues that these facts do not constitute a criminal offence and that they do not meet the test of double criminality.

It is stated in the facts that on March 13th 2012, Caroline and Paul kissed and undressed while in her apartment, then Paul laid on top of her, held her arms, spread her legs and tried to have unprotected sex with her, to which she resisted, insisting that he use a condom. Paul finally agreed to do so and had the sexual intercourse. Caroline filed the criminal complaint on the 20th of March, i.e. seven days after the mentioned facts took place.

Those facts, as stated, seem to imply that Caroline was actually just resisting to having unprotected sex, not to not having sex with Paul at all. She asked him to use a condom, to which he ultimately agreed to, and then she went on with the encounter and even invited him to her apartment again on the 17th. Thus, it seems like what really happened was a “disagreement” or an argument between the two of them, to which obviously Caroline did not give much importance initially, since she subsequently slept with Paul anyway.

The facts do not have enough entity or are not serious enough as to constitute any crime under the Law of Y. Moreover, a basic principle of proportionality –which will be addressed below- would strongly discourage any judicial authority to issue an EAW based solely on those facts, as they clearly do not constitute a serious criminal offence and may be deemed to be an abuse of the system of the EAW established in the Framework Decision.

B.- In relation to **charge (2)**, “sexual molestation”, it is once again a criminal offence that it is not specifically included in the list of criminal offences set forth in article 2.2 of the Framework Decision. Therefore, as established in article 2.4, the execution of the EAW could be granted depending on whether the facts of the case constitute a criminal offence according to the national Law of Y, the executing Member State.

Charge (2) of the EAW issued by the Public Prosecutor states that such offence is based on the fact that Paul consummated the intercourse and ejaculated even though the condom was torn. Paul’s counsel argues that there was no lack of willingness, which is indispensable to constitute the said criminal offence.

According to the stated facts, there is in fact no evidence that Paul actually knew that the condom was torn, nor that Caroline noticed it right away and asked him to stop. There is no evidence -and it is difficult to prove- that he knew that the condom was broken and that he decided carry on anyway without Caroline’s consent.

Moreover, it should be noted that “sexual molestation” is probably not a very serious criminal offence under the Law of Z, thus it could also be questioned whether it meets the standards of article 2.1 of being punishable with at least 12 months of imprisonment.

As a consequence of the above, it could also be argued that the facts of charge (2) do not constitute a crime under the Law of Y, so that the double criminality requirement would not be met. Furthermore, it should be noted that this offence is also not serious

enough as to justify the issuing of an EAW, which forces us to go back to considering the principle of proportionality again.

C.- The last **charge (3)** is “rape”, which according to 2.2 of the Framework Decision is one of the listed offences that are deemed to be automatic extraditable offences, therefore removing the test of double criminality.

Thus, being the third count one of the criminal categories included in the Framework’s list of offences, the counsel for the defense of Paul would not be able to make any argument in relation to the double criminality (the facts of it not constituting a crime under the Law of Y), nor will the receiving judicial authority be able to consider the grounds or merits of it, as it is not required to satisfy the double criminality requirement.

It should however be noted that the facts of charge 3, as they have been described, may not constitute “rape” under the Law of Y, as such crime is mainly based on the lack of consent of the victim of the sexual assault and it is not clear that in the case at hand Caroline actually refused to have the sexual intercourse with Paul. In fact, it seems like she woke up and was aware of what Paul was doing, still there is again no evidence that she actually asked Paul to stop, and is it also unclear that he knew that she was not consenting the sexual relations –specially since they had been having sexual relations since the day before-.

Despite the above, because the Public Prosecutor of Z ticked the box of “rape” on the EAW form, the counsel’s arguments cannot be considered by the Court of Y, as the executing judicial authority could only consider denying the execution of the EAW if it was obvious that they do not constitute the crime for which the EAW was issued, which is not the case.

In this regard, the European Union Court of Justice, in the ruling of the case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, clearly stated in this regard that *“In accordance with Article 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, ‘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’ [...] the actual definition of those offences and the penalties applicable are those which follow from the law of ‘the issuing Member State’.* The Framework Decision does

not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. Accordingly, while Article 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State".

3. IN RELATION TO THE ISSUING OF THE EAW.

A) Despite being true that a defendant can voluntarily refuse to attend a hearing in a foreign country, that it does not mean that he will not have to face the consequences of such refusal. In the case at hand the competent judicial authority of Z has interpreted such denial as fleeing and lack of cooperation with the authorities of Z. Maybe such an interpretation may not be reasonable as Paul has just been notified to appear before the Court of Z once, and as it will be addressed below there are other procedural means by which his formal interrogation could be conducted.

In this regard, in relation to the allegations of Paul's defense lawyer as to the proportionality of the use of the EAW by the judicial authorities of Z in this case, it could indeed be argued that there has been a lack of proportionality due to the following reasons:

Firstly, the defendant can voluntarily refuse to attend a hearing in a foreign country, although that such refusal cannot be equated to an aim of fleeing or non-cooperating, since, article 3 of the European Convention of 20th April, 1959 on Mutual Assistance in Criminal Matters would be applicable.

According to such provision, the competent judicial authorities of Y shall execute, in the manner provided for by its Law, any rogatory letters related to a criminal investigation and addressed to them by the competent judicial authorities of Z for the purpose of gathering evidence. The formal interrogation of the suspect is obviously the key piece of evidence in any criminal investigation.

Secondly, if the criminal proceeding is directed against Paul as the main suspect, and should the judicial authorities of Z have enough evidence against him, the provision of paragraphs 1 and 9 of article 10 of the Council Act of 29th May 2000 could have been applied, so that Paul's hearing could have been conducted by videoconference from Member State Y. The application of such provisions requires the previous agreement between the competent national authorities of Z and Y, in accordance with their relevant

applicable Law and other international legal instruments, such as the 1950 European convention for the Protection of Human Rights and Fundamental Rights and Fundamental Freedoms.

The problem in the case at hand is that it is unclear whether Member States involved have reached an agreement as to whether they should hear Paul by videoconference or not, and there is no information available as to whether Paul has given his consent to it. Thus, we cannot conclude that such mechanism for conducting the interrogation would actually be available in this case.

Finally, it should be noted in this regard that the European Commission acknowledges in its report of April 11th 2011 on the implementation since 2007 of the Framework Decision, that the EAW should only be used to prosecute major crimes but that it is being misused for low-level crimes. Thus, it urges European Member States to sort out the problem by themselves by only using the EAW for what it was really intended initially, i.e. to prosecute or punish “major crimes”.

It further recommends that a better statistical monitoring system should be put in place, that national judicial authorities should receive more training regarding the EAW in order to avoid overusing the mechanism. Those national judicial authorities are asked by the Commission to further consider other alternative legal tools or measures that may be more appropriate and proportional considering the case before them previous to issuing an EAW.

Notwithstanding the above, the defendant’s lawyer arguments that the proportionality principle in this particular case has not been met, should however be dismissed based on the following reasons:

1.- As to the facts that constitute the criminal offences reported by Caroline, the proportionality standards must be examined by the issuing judicial authority prior to issuing the EAW. Therefore, if such authority considers that the related facts are serious enough to justify issuing the EAW, that decision cannot be contended by the executing judicial authority.

It should be taken into account that, as stated above, one of the objectives of the Framework Decision is to enforce the cooperation relations between Member States by implementing the principle of mutual trust and mutual recognition, as it is expressly stated in article 1.2 of the Framework Decision (“*Member States shall execute any*

European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision”).

Allowing the receiving judicial authorities to reassess the proportionality of the EAW would be a breach of the aforementioned mutual trust.

Moreover, in this regard, the judicial authority of the executing Member State is not allowed to inquire about the facts and the proportionality of the crime and the penalties assigned to it by the national Law, as long as the issuing Member State respects both the fundamental rights and the fundamental legal principles as enshrined in articles 1 of the Framework Decision and 6 of the Treaty of the European Union.

2.- In addition to the above, the proportionality principle could not be assessed by the receiving judicial authority in order to consider that the issuing authorities should have previously used other legal tools or mechanisms before using the EAW. The fact is that there is currently no control that the receiving Member State can apply, as it's intervention is limited to the execution of the EAW as long as it complies with the provision of the Framework Decision.

Considering that there is currently no obligation for the issuing judicial authorities to satisfy any proportionality test, the EAW of the case before us would have to be executed.

B) The Criminal Procedure Code of Z states that in order for formal charges to be brought before a criminal court, Paul has to be subjected to a formal inquiry.

However, issuing an EAW does not require that criminal charges have been brought before the competent criminal court, since article 1 of the EAW Framework Decision establishes that an EAW 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 (...)*”.

From a strict interpretation of said article it should be understood that the reference to “*conducting a criminal prosecution*” refers to the investigating process up (either conducted by a Judge or by a Public Prosecutor) to the point where the case is brought before the competent criminal court.

Furthermore, the consideration of whether the extradition for the purpose of interrogation with a view to obtaining evidence for a prosecution is a legitimate purpose

for issuing an EAW, is something that the receiving judicial authority cannot analyse. As stated above, the receiving and executing authority has to trust the issuing judicial authority and cannot inquire into the purpose of the extradition.

Therefore, the defence lawyer's arguments regarding this matter shall be refused.

3. IN RELATION TO THE CONSEQUENCES OF A POTENTIAL EXECUTION.

In such a matter, the Public Prosecutor of Z considers that according to article 5.3 of the Framework Decision, the execution of the EAW by Y, by the law of Y, may be subject to the condition that Paul (a resident in Y for more than 12 years), after being heard, is returned to Y in order to serve the custodial sentence or detention order passed against him in Z. However, Y grants that privilege only to its own nationals.

In this regard, Y must review its position in this matter and take into account the "*interpretation in conformity principle*" as stated in the ruling of the European Union Court of Justice of June 16th 2005 in the *Pupino* case, (C-105/03), according to which national authorities, and particularly national courts, are under an obligation to interpret national law according to the framework decisions.

Such a ruling shall be directly connected with the aforementioned article 5.3 of the Framework Decision, since it establishes that "*where a person who is 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*"

Moreover, the Grand Chamber, in the European Union Court of Justice ruling of October 6th 2009 on criminal proceedings against Dominic Wolzenburg (C-123/08) has stated as follows:

- a) that if the person who is the subject of the EAW has sufficient connections with the executing Member State to give grounds for concluding that execution of the sentence in that State would increase that person's chances of reintegration, the executing Member State must grant such a possibility; and
- b) that a five-year period of residence in the territory of the executing Member State shall be deemed as sufficient for the purposes of the aforementioned guarantee.

In addition to the above, we shall note that the Grand Chamber, in the ruling of the European Union Court of Justice of July 17th 2008 on the criminal proceedings against Szymon Kozłowski (case C-66/08) has stated that a requested person is “resident” in the executing Member State when he/she has established his actual place of residence there and he/she is “staying” there when, following a stable period of presence in that State, he/she has acquired connections with that State which are of a similar degree to those resulting from residence.

To conclude, it shall be stressed the fact that the European Union Court of Justice, in the aforementioned decisions applies the systematic and teleological interpretation of the European Union Treaty, which mentions in article 1.2 the need to create “*an ever closer union among the peoples of Europe*”, thus forbids any kind of discrimination between nationals of Member States in order to make true the establishment of an area of freedom, security and justice where all European citizens can choose freely where to live.

4. CONCLUSIONS:

The EAW framework is indeed just a natural next step in the development in the law of extradition, especially given the cooperative nature of the EU and the application of the principle of mutual recognition between the Member States.

The EAW is a fast and effective tool, but it is a mechanism that is being used too much by some Member States that overuse the system for minor criminal offenses, thus creating a problem of proportionality and generating serious concerns in relation to the protection of individual’s rights.

The European Commission has acknowledged the existence of these problems and that further measures should be taken in order to improve the current EAW system. In this regard, the EU charter of fundamental rights could provide legal basis for establishing a proportionality test that would force the issuing Member State to consider whether the use of the EAW is proportionate according to the facts and merits of the case and if it imposes a disproportionate burden on the requested individual or on the State from whom the individual is requested.

Such a requirement should prevent Member States from issuing an EAW for minor crimes and would determine that the system is properly use to prosecute only serious crimes that justify the amount of efforts and economic resources spent.

It should be noted that such proportionality test should be applied or considered by the issuing Member State, not the executing Member State, as that would constitute a breach of the principle of mutual recognition and trust.

Moreover, the efficiency of the EAW system requires that national judicial authorities trust that law enforcement officials of other Member States use it responsibly. In this regard, the EU Commission could take action and issue some guidelines that would as to how to duly use the EAW system, thus avoiding the rising concerns of some Member States that individual rights are being overlooked.

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