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REPORT ON THE CASE POSTED

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REPORT

I. Introduction

In order to determine whether the European Arrest Warrant (hereinafter the EAW) should be executed, this is, whether Paul should be surrendered to State Z, it is first of all important to stress the spirit of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (hereinafter FD), which constitutes the European legal framework governing the present case. The FD is the first specific measure in the field of criminal law implementing the principle of mutual recognition[1], and the mechanism that it provides is based on a high level of confidence between Member States[2].Its purpose was to replace the European Extradition Convention of 1957 and other Conventions by a new regime for surrender between judicial authorities, founded on the basis of the common area of justice and on the above-mentioned principles. This new regime reduces the grounds for denying the surrender of Paul, in comparison to the previous regime. As a matter of fact, the dual criminality principle[3], that has long been a principle of extradition, gets mitigated through the FD. It remains only a condition for surrender in cases where the committed offence is not expressly listed in article 2.2 of the FD, in which case the court executing the EAW is not allowed to verify double criminality if the offence is punishable by a penalty of imprisonment of a maximum of at least three years.

II. Analysis of the arguments of Paul's defence lawyer

1. The charges

The first argument adduced by Paul's defence lawyer in order to sustain his point of view that Paul should not be surrendered to Member State Z, is actually that the facts related to the charges listed as one and two in the practical case do not amount to a criminal offence, both under the law of Y and the law of Z. In relation to the third charge, he argues that the facts described by Z's Public Prosecutor do not amount to rape in the sense of the FD.

[1] Recital 6 of the FD
[2] Recital 10 of the FD
[3] According to the dual criminality rule, a person should only be extradited when his conduct is considered as an offence under the law of the State requesting extradition, and under the law of the State from which the person's extradition is sought.

According to the specialty rule established in article 27.2 of the FD Paul could not be prosecuted, sentenced or otherwise deprived of liberty in State Z, for offences committed prior to his surrender other than those for which he was surrendered[4].

On the basis of Article 2 of the FD, this Court has to examine the description of the offences in the EAW, in order to decide upon the surrender of Paul, for the purposes of prosecution of the three offences in State Z. That description must, in accordance with the form in the annex to the FD, contain the information referred to in Article 8 of the FD, that is, the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person, and the prescribed scale of penalties for the offence.

1.a) Unlawful coercion: In the present case Z's Public Prosecutor classifies the first charge as an unlawful coercion, on the grounds that Paul lied on top of Caroline, holding her arms, spreading her legs, and trying to have unprotected sex with her. Paul's defence lawyer argues that these circumstances cannot constitute a criminal offence under the law of either Z or Y. It is not for this Court to decide, in principle, whether the facts alleged constitute a criminal offence under State Z's law. The Court executing the EAW must scrutinise it in order to make sure that it fulfils the requirements of the FD. It should however in principle accept the classification made in the issuing Member State. The principles of mutual recognition and mutual trust abolish the margin of discretion afforded to Member States in previous legal instruments, conceiving cooperation as a duty with the sole exceptions comprised in the grounds for refusal regulated in the different european instruments regarding cooperation. In this sense, the European Court of Justice has expressly stated that *"the principle of mutual recognition, which underpins FD 2002/584, means that, in accordance with Article 1(2) thereof, the Member States are in principle obliged to act upon a European arrest warrant. Apart from the cases of mandatory non-execution laid down in Article 3 of the FD, the*

[4] Case C-388/08 PPU *Leymann and Pustovarov* states that by a judgment given by the urgent preliminary ruling procedure the Court provides importance guidance on the scope of the speciality principle, under which a person surrendered to another Member State can be prosecuted in that Member State only for the offence for which s/he was surrendered, in the context of the application of the FD.

Member States may refuse to execute such a warrant only in the cases listed in Article 4 thereof" [5].

As regards the classification of the offence in State Y, in most EU Member States the facts described are indeed indicative of the commission of a criminal offence, since Caroline was restrained without her consent. For example in Spain, the described conduct would be indicative of a coercion under Article 172 of the Spanish Criminal Code, which punishes those that with violence force others to act against their will. Thus, the dual criminality condition would be complied with.

1.b) Sexual molestation: As regards the second charge, Z's Public Prosecutor classifies it as a sexual molestation, as Paul consummated intercourse and ejaculated although the condom had torn. Paul's defence lawyer argues that these circumstances cannot constitute a criminal offence under the law of either Z and Y, as the lack of willingness is indispensable to integrate the criminal offence under the law of both countries. As it has already been stated in relation to the prior offence, it is not for this Court to decide whether the facts alleged constitute a criminal offence under State Z's law. This is something that has already been done by the issuing authority. It is for this Court to examine whether the facts amount to a criminal offence under the law of Y. For instance, in Spain these facts could be constitutive of a sexual offence punished in Chapter I of Title VIII of the Spanish Criminal Code.

It must be noted, that the fact that Caroline consented to have a certain type of sexual relation, making it clear that she would only have sexual intercourse if Paul used a condom, cannot be understood as her giving her consent to having another type of sexual intercourse. Sexual intercourse with or without a condom cannot be equalled, given the presence of a physical barrier that reduces the risks of unprotected sex.[6] Morover, whether Caroline gave her consent, or the sexual intercourse happened with a lack of willingness is something that has to be investigated through the pertinent

[5] Case C-388/08 PPU *Leymann and Pustovarov*, paragraph 51; Case C-123/08 PPU *Wolzenburg*, paragraph 57; Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 29

[6] Unprotected sexual intercourse may lead to the contraction of diseases such as HIV. Caroline is actually concerned, that through the unprotected intercourse, that she pledges was unconsented she may have contracted the referred disease. This concern is proved by the fact that she in vain asked Paul to undergo an AIDS test and inform her of the results.

proceeding in State Z. Therefore, the facts described as charge two are indicative of the possible commission of a criminal offence in both States Y and Z.

Common issues to 1.a and 1.b: Nevertheless, as regards both charges Z's Public Prosecutor does not mention the scale of penalties prescribed in his State. We only know that sexual molestation and unlawful coercion are abstractly punishable by imprisonment. This is an essential fact, as according to Article 2.1 of the FD, concerning the criminal offences that are still subject to verification of dual criminality, in order to decide on the surrender of Paul, the criminal offence, must be punishable *"by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months".* According to article 15.2 of the FD, Z's Public Prosecutor could be requested to provide the necessary supplementary information. If the outcome is that the penalty prescribed rests within the FD limits Paul should be surrendered to State Z on the grounds of sexual molestation and unlawful coercion.

1.c) Rape: Finally, regarding the third charge Z's Public Prosecutor classifies it as a rape, as Paul had sexual intercourse with the initially-sleeping and then half-asleep Caroline, without using a condom. Paul's defence lawyer argues that these facts do not amount to rape in the sense of the FD. Rape is one of the criminal offences listed in Article 2.2 of the FD and, thus, the court executing the EAW is not allowed to verify if double criminality exists, as the offence is punishable by a penalty of imprisonment up to eight years. The FD does not define either rape or other criminal offences. Although there has not been a harmonisation of criminal laws within the EU, the European Court of Human Rights[7] considers that the trend is towards regarding lack of consent as the essential element of rape. In any case, it is not necessary to approach the issue in this way. The law of the issuing State governs[8].

Therefore, execution must be granted on the grounds of rape.

2. The issuing of the arrest warrant

[7] See Judgement of the European Court of Human Rights in case M.C. v. Bulgaria, App. 39272/98, 4 december 2003

[8] Case C-303/05 PPU *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, paragraph 52, following the opinion of Advocate General Dámaso Ruiz-Jarabo on the same case (paragraph 104).

2.a) Refusal to attend the hearing in Z and proportionality: Whether the defendant's refusal to voluntarily attend a hearing in State Z is legal or not should be determined by State Z's legislation, since a procedural law harmonization has not yet been made within the European Union and Z's legislation applies to proceedings initiated in Z. As Z's legislation provides that Paul's hearing is mandatory in order to bring legal charges before a court, the defence cannot discuss the validity of that provision without undermining the principle of mutual trust. The requested Member State is not supposed to question the rules in force in the requesting Member State, even when these rules differ from their own.

The revised version of the European Handbook on how to issue a European Arrest Warrant establishes that, although the FD does not expressly require a proportionality check, the competent authorities should, before deciding to issue a warrant, consider proportionality by assessing a number of important factors such as the seriousness of the offence, the possibility of the suspect being detained and the likely penalty imposed if the person sought is found guilty of the alleged offence [9]. This is justified in view of the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person. This requirement of a proportionality check is also mentioned in the Report from the Commission to the European Parliament and the Council On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [10].

The defence could, however, have questioned the proportionality of the arrest warrant before the competent authority of Z, that issued the arrest warrant. To raise this issue at this stage of the arrest warrant's execution could jeopardise the principle of mutual trust and could cause delay contrary to the European arrest warrant's purpose.

Although it is strictly speaking not necessary to check proportionality we nevertheless regard the issuing of an EAW in this case is proportional for the following reasons:

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1. The offences supposedly committed by Paul are serious. In fact, one of them is comprised within article 2.2 of the Framework Decision. In regard to this type of offences the ECJ has stated that *"the Council was able to form the view, ... (that), the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality"*[11].

2. The requirement of proportionality is also met because the hearing by videoconference is dependant on Paul's consent and the agreement of both Member States according to articles 10.2 and 10.9 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [12]. This determines that the hearing of Paul by videoconference could not take place if he opposed or States Y and Z did not agree to arrange a videoconference. Taking into account Paul's previous behaviour it is very likely that he refuses to be inquired via videoconference, frustrating thus the aim of prosecution. Besides, technical difficulties could render that mutual legal assistance tool ineffective. In the light of the foregoing the issuing of an EAW,seems to be proportional for the purposes of prosecution.

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[11] Case C-303/05 PPU *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, paragraph 57

[12] Article 10.2 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union provides that *"the requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement"*.

Article 10.9 establishes that that *"Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carriedout, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Any Member State may, when giving its notification pursuant to Article 27(2), declare that it will not apply the first subparagraph. Such a declaration may be withdrawn at any time. Hearings shall only be carried out with the consent of the accused person. Such rules as may prove to be necessary, with a view to the protection of the rights of accused persons, shall be adopted by the Council in a legally binding instrument".*

2.b) Previous decision on the prosecution of the requested person. The issuing of an EAW does not require a previous decision on the prosecution of the requested person. This can be inferred of the wording of the Preamble, which uses the expressions *"persons suspected of having committed an offence"* (recital 1) or *"suspected persons"* (recital 5). In fact, Article 1 of the FD, which defines the EAW, refers to *"the arrest and surrender of a requested person for the purposes of conducting a criminal prosecution"*. This is corroborated by the amended version of the European Handbook on how to issue an EAW, which states that *"a warrant may be issued for purposes of criminal prosecution (...) during the investigation, examining and trial stages, until the conviction is final"* [13], without requiring a formal decision on the prosecution of the requested person.

Furthermore, the stage of proceedings in which the decision to prosecute a person must be taken may differ throughout the Member States due to the lack of harmonisation of procedural law rules [14]. Although the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union aimed to offer an equivalent level of protection to suspects and defendants throughout the European Union by way of establishing common minimum standards that should facilitate the application of the principle of mutual recognition, this FD has not been passed yet. Therefore, it can not be argued that the FD requires a formal decision containing the charges of the requested person. Interpreting the FD in the sense proposed by Paul's defence lawyer would undermine the principle of mutual trust, as it would enable Member States to question each other's procedural law. The ECJ has clearly stated that according to the principle of mutual trust Member States shall recognise the criminal law in force in the other Contracting States even when the outcome would be different if its own national law was applied.[15] This is also applicable to procedural law, otherwise the aim of free movement of judicial decisions stated in recital 5 of the Preamble could be jeopardised.

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[14] For instance, some criminal proceedings in Spain (*procedimiento abreviado*) lack a formal decision on the suspected person's prosecution.

[15] *Van Esbroeck*, paragraph 30; C-467/04 *Gasparini*, paragraph 30; Case C-187/01 and 385/01 PPU *Gözütok and Brügge* , paragraphs 27 and 31; Case C-297/07 *Bourquain* paragraph 37

3. The consequences of the potential execution

In its implementation rules of article 5.3 FD State Y has limited to nationals the possibility of conditioning the surrender to the execution of the final sentence in State Y. However, the wording of article 5.3 of the FD includes *"residents"* within its scope. Thus, the limitation does not appear to be consistent with EU Law. In interpreting the optional non-execution cause of article 4.6 FD, the ECJ has clearly stated that a Member State has no margin of discretion to limit this non-mandatory ground only to nationals[16]. The ECJ has stated that the objective of article 4.6 is to increase the requested person's chances of reintegrating into society, once the sentence has expired[17]. This criterion should be applicable by analogy to the interpretation of article 5.3 clause, since both, article 4.6 and article 5.3, are clearly inspired by the same *ratio*. Moreover, the objective of rehabilitation does not only serve the interests of the sentenced person, but also the common interest of Member States, since citizens who have observed an unlawful conduct have the chance to turn into law-abiding persons[18]. Rehabilitation possibilities are therefore increased if the custodial sentence is enforced where the person has a stronger connection. In interpreting article 4.6 FD, the EJC has held that the margin of discretion has to be interpreted within the wording of the article. Thus, Member States may determine under which conditions a person is to be considered as being integrated in society[19]. Otherwise, it would be the executing court's task *"to make an overall assessment of the various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State"* [20].

[16] See Case C-66/08 Kozlowski; Case C-123/08 PPU *Wolzenburg*; Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*.

[17] Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 32; Case C-66/08 *Kozlowski*, paragraph 45; Case C-123/08 PPU *Wolzenburg*, paragraph 62; and Cae C-306/09 *I.B.*, paragraph 52

[18] This is shared by Advocate General Mengozzi in his Opinion on the Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 37.

[19] Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 33 and Case C-123/08 PPU *Wolzenburg* paragraphs 61, 67 and 73).

[20] Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 43; Case C-66/08 *Kozlowski* and Case C-123/08 PPU *Wolzenburg* paragraphs 48-49; 76)

The ECJ considered that, limiting the non-execution cause of article 4.6 to nationals of the executing Member State undermines the principle of non discrimination on the grounds of nationality[21] . It should be borne in mind that this principle is consecrated in article 18 of the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights in the EU[22]. This principle of non discrimination on the grounds of nationality is to be taken into account in the assessment of article's 5.3 FD implementation. As articles 4.6 and 5.3 are not intended to protect nationals, but citizens settled in society regardless of their actual nationality, the limitation of these provisions does not appear to be legitimate. Thus, according to the doctrine of the ECJ, this limitation is contrary to the principle of non-discrimination. [23]

In Maria Pupino the ECJ has ruled that the executing Court has to interpret its domestic law in the light of the wording and purpose of the FD, with a view to ensuring that the framework decision is fully effective and an outcome consistent with the objective pursued by it is achieved[24].

In the light of the foregoing, the term national of the implementing rules should be interpreted in a broad sense, so that persons integrated in society could be seen as nationals.. In this case, as Paul, a national of Member State X, has lived and worked in Member State Y for more than 12 years, he can be assimilated to a national.Thus, the EAW should be executed under the guarantee that in case of condemnation, Z has to return Paul to Y where the sentence will be enforced, since despite being national of another State, his condition of resident in Y increases its possibilities of reintegration in society.

[21] Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 50

[22] See article 21 CFRUE.

[23] Case C-42/11 PPU *João Pedro Lopes Da Silva Jorge*, paragraph 40; *Wolzenburg*, par. 68
[24] Case 105/03 *Maria Pupino*, par. 47

III. Concluding remarks

After examining the arguments put forward by Paul's defence lawyer the conclusion is that these arguments have to be dismissed and that the EAW issued by the competent authority of Member State Z needs to be executed.

The charges of unlawful coercion and sexual molestation amount to a criminal offence both under the law of Z and Y. Under the principle of mutual trust it is not for this court to question the classification of the facts made under the law of Z by the competent authority of Z. Under the law of Y the facts amount to a criminal offence. Since the issuing authority has not provided the necessary information as regards the scale of penalties provided for these crimes under the law of Z it might be advisable to request the issuing authority to provide the necessary supplementary information (art. 15.2 FD). As regards the charge of rape this is a crime listed in art. 2.2 FD. It is therefore not necessary to examine whether the conduct meets the double criminality requirement. The law of Z governs, the FD does not contain any definition of rape.

Member State Z's procedural law is entitled to require that Paul attends a hearing. Proportionality is not a principle that can be raised in the phase of execution of an EAW. In any case the issuing of an EAW seems to be proportional in the present case in view of the seriousness of the offence particularly of rape and because the use of video-conference or other legal tools is dependent on Paul's consent and Member State's X and Y's availability. The issuing of an EAW does not require a previous decision on the prosecution of the requested person. Criminal procedural law has not been harmonised and such a requirement is not founded under the FD and would jeopardise the principle of mutual trust.

Since Paul is a citizen of Member State X who has resided in Member State Y for more than 12 years he should be transferred to Z under the condition that he will be returned to Y after the Trial. State Y's implementing rules of the FD should be interpreted in conformity to the principle of non discrimination on the grounds of nationality and the FD.