REPORT ON THE EXECUTION ON THE EAW ISSUED BY MEMBER STATE Z AGAINST PAUL

Regarding the case of the European arrest warrant (hereinafter, EAW) issued by member state Z against Paul, the following facts are to be considered:

- Paul is a national of member state X, living and working for 12 years in member state Y and committed the alleged crimes in member state Z;
- Paul did not consent to surrender and, as a consequence, Articles 13-15 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member state (hereinafter, FD) are not applicable;
- The EAW has been issued during the criminal prosecution against Paul;
- For the first 2 charges, the double criminality condition has to be verified; for the last, the rape, no such condition is imposed by the FD.

1. a) Regarding the first accusation

Circumstances of the case

The first charge brought by the **prosecutor** against Paul consists in 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 of March 2012. On these grounds, **the court** issuing the national arrest warrant held that Paul was strongly suspected of having committed this offence under the Criminal Code of Z. The court also held that the offence is punishable by imprisonment.

Paul's **defense lawyer** argues that the facts do not, as a matter of law, amount to a criminal offence, both under the law of Y and the law of Z. In other words, the lawyer alleges that *nullum crimen sine lege* principle is not respected in this case, because the facts are not prohibited by criminal law of neither states.

Legal opinion for the judge

Regarding the relevance of this argument, the following aspects need to be taken into account:

Considering that unlawful coercion has not been signaled in box e) of the EAW issued by member state Z[1], we are in a case where double incrimination is necessary for the execution of the warrant, in accordance with Article 2 paragraph 4 of the 2002/584/JHA Framework – decision.

Double criminality means that facts are to be considered criminal offences under the law of both states. Regarding incrimination in state Z, this condition is fulfilled since the court and the prosecutor from the issuing state qualified Paul's acts as a criminal offence under state's Z criminal code, *id est* unlawful coercion. In these conditions, taking into account the principle of mutual recognition provided by Article 1 paragraph 2 of the FD and defined by the European Union Court of Justice (hereinafter, EUCJ)[2], state Y cannot examine if these facts are indeed criminal offences under the law of state Z.

Regarding incrimination in state Y, the judge has to verify if the facts are incriminated as a criminal offence in our national law. If there is such an incrimination, next step should be to examine if the conditions imposed by article 2 paragraph 1 of the FD are fulfilled because the judge from the executing state should undergo a formal examination of the legality of the issuing of the EAW: acts punishable by the law of the issuing member state by custodial sentence or a detention order for a maximum period of at least 12 months. Since the EAW does not provide these information, the judge should demand additional information following the procedure prescribed by article 15 paragraph 2 of the FD[3].

If there is not such an incrimination under our national law, the judge should reject the execution on the EAW for this charge.

[1] According to ECJ case-law, the issuing state is the only one competent to fill in the EAW and, in our case, the issuing state did not signaled any box related to the coercion and missed the opportunity to mark also the box "illegal restraint".
[2] Case C-303/05 - Advocaten voor de Wereld VZW v Leden van de Ministerraad,§ 28, Kozlowski C-66/08, § 31
[3] The procedure implies the examination of the fulfillment of the conditions imposed by, *inter alia*, Article 8 paragraph 1 letter d. The latter provides that the issuing state should describe the nature and the legal classification of the offence, particularly in respect of Article 2.

1. b) Regarding the second accusation

Circumstances of the case

The second charge brought by the **prosecutor** against Paul is sexual molestation by consummating intercourse and ejaculating although the condom had torn on the same occasion. On these grounds, **the court** issuing the national arrest warrant held that Paul was strongly suspected of having committed this offence under the Criminal Code of Z. The court also held that the offence is punishable by imprisonment.

Paul's **defense lawyer** argues that the facts do not amount to a criminal offence, on the basis of the lack of willingness indispensable to integrate the criminal offence, both under the law of Y and Z. Moreover, the lawyer sustains that Caroline did not allege that Paul noticed or was aware of the rupture of the condom. In other words, the lawyer challenges that the case is well – founded, more exactly that the fact lacks intent, one of the basic elements of the crime.

Legal opinion for the judge

For the same reasons as shown above, in this case double criminality is necessary in order to execute the EAW. The fulfillment of this condition is not challenged by Paul's lawyer, the only aspect he argues is that the facts do not amount to sexual molestation because of lack of willingness.

This argument is without relevance in the execution procedure of the EAW, because the judge from the executing member state cannot analyse this aspect[4]. Considering the principle of mutual recognition which is the cornerstone of judicial cooperation and the entire procedure provided by the FD, the judge from the executing member state cannot examine if a case is well – founded. His analysis is strictly limited to the fulfillment of the conditions for the issuing and execution of the warrant, in particular articles 2-5 and 8 of the FD.

1. c) Regarding the third accusation

Circumstances of the case

The third charge brought by the **prosecutor** against Paul is rape committed on March the 18th, by having sex with the initially sleeping and then half-asleep Caroline without using a condom. On these grounds, **the court** issuing the national arrest warrant held that Paul was strongly suspected of having committed this offence under the Criminal Code of Z. The court

[4] The limits of examination derive from Article 15 paragraph 2 of the FD

also held that the offence is punishable by imprisonment up to 8 years due to it being considered particularly serious.

Paul's **defense lawyer** argues that the facts do not amount to rape in the sense of the FD. In other words, the lawyer emphasizes that the list of crimes enumerated by article 2 paragraph 2 of the FD have an autonomous content in EU law.

Legal opinion for the judge

In the EAW issued against Paul, the issuing judicial authority signaled the box referring to rape in table e). Therefore, according to article 2 paragraph 2 of the FD, the double criminality condition is abandoned for this charge, because rape is among the 32 crimes listed there. Moreover the condition regarding the minimum penalty prescribed by the same article is fulfilled, as rape is punishable in the issuing state by up to 8 years of imprisonment.

According to ECJ case – law[5], "*even if the Member States reproduce word-for-word the list of the categories of offences set out in Article 2(2) of the Framework Decision for the purposes of its implementation, 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*."

As a result, there is no specific meaning of rape in the sense of the FD. The definition is the one provided by the issuing member state's law, and the qualification of the facts was set by the latter state when the EAW was issued. Therefore, the judge from the executing member state cannot undergo such an operation.

2. a) Regarding the first argument on the issuing of the EAW

Circumstances of the case

Paul was notified by the prosecutor to travel to Z for a formal interrogation, as this act is mandatory under Criminal Procedure Code of Z in order for formal charges be brought before a criminal court, but he refused to do so. Therefore, the court issued a national arrest warrant against Paul, considering his refusal equivalent to fleeing and non-cooperation, on the grounds of which the EAW was issued.

[5] Case C-303/05 - Advocaten voor de Wereld VZW v Leden van de Ministerraad, §52

Paul's defense lawyer argues, in the first place, that his client's refusal to attend a hearing in a foreign country was perfectly legal **(i)**, and that the measure of the EAW was not proportional with the circumstances of the case, since other less restrictive measures could have been taken **(ii)**.

Legal opinion for the judge

(i) The principle of territoriality of criminal law, as a general principle of criminal law in the EU, implies that the law of the state in which the crime has been perpetrated is applicable for the criminal trial, regardless the nationality of the perpetrator. As a result, all rights and duties stipulated by that law are applicable to the perpetrator.

Taking this consideration into account, Paul had the obligation to attend the hearing he was summoned to, because all individuals have the duty to collaborate with state's judicial authorities, irrespective of their nationality.

This conclusion does not contradict Article 6 of the ECHR regarding the right to a fair trial which guarantees each individual the right against self-incrimination. The latter implies that the defendant cannot be forced to make any statements before the judicial authorities concerning the charges which are brought against him.

In other words, Paul had the obligation to attend the hearing and, once there, the right not to make a statement before the prosecutor.

Since this was an obligation that Paul did not respect, the refusal cannot be considered as legal and state Z could take the necessary measures according to its national law.

(ii) Regarding the proportionality argument there are two main opinions:

On one hand, a control of proportionality is not allowed because the FD does not provide any such obligation neither for the issuing authority, nor for the executing one. By adopting this point of view, the execution of the warrant cannot be refused by the executing member state.

On the other hand, there are more and more voices that demand a control of proportionality in respect of human rights guaranteed by Charter of Fundamental Rights of the

European Union and the ECHR. In the same line, the Handbook on the EAW[6] states that "*it is clear that the Framework Decision on the EAW does not include any obligation for an issuing Member State to conduct a proportionality check and that the legislation of the Member States plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on physical freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors".*

Even though there is no express obligation stated in the FD to examine the proportionality of the EAW by the issuing state, some member states[7] have refused to execute it if their judges appreciated that the EAW was issued in disregard of this principle. However, according to Article 1 paragraph 3 of the FD, the framework decision shall not have the effect of modifying the obligation to respect fundamental right and fundamental legal principles in Article 6 of the Treaty on European Union.

According to Article 6 paragraph 1 of the TUE in conjunction with Article 52 paragraph 3 of the Charter of Fundamental Rights of the European Union, the European Court on Human Rights (hereinafter, ECHR), standard applies to the rights guaranteed by the Charter.

The proportionality principle is stated by Article 49 of the Charter and also by the case – law of the ECHR. In our case, since the EAW implies a deprivation of liberty, the standard of Article 5 of the ECHR must be respected. Thus, deprivation of liberty has to be taken in accordance with national law, and only if no other less restrictive measures are not available[8].

The Handbook on EAW recommends the following criteria when the proportionality check is being made: assessment of the seriousness of the offence, the possibility of the suspect being detained, the likely penalty imposed if the person sought is found guilty of the alleged offence, ensuring the effective protection of the public and taking into account the interests of the victims of the offence. Moreover, the Handbook suggests, in accordance with the ECHR case – law, that the EAW *"should not be chosen where the coercive measure that seems proportionate, adequate and applicable to the case in hand is not preventive detention".*

[6] Revised version of the European handbook on how to issue a European Arrest Warrant, Council of the European Union, Brussels, 17 December 2010, 17195/1/10
[7] Higher Regional Court Stuttgart, Decision of February 25, 2010 – Ausl. (24) 1246/09, *apud* Proportionality and the European Arrest Warrant by Judge Professor Joachim Vogel and Comment by Professor J.R. Spencer, Criminal Law Review 2010, pg. 474
[8] Tarau v. Romania, ECHR, 24 February 2009, §51

According to the same Handbook, the proper application of the EAW procedure requires that it should not be issued, where less coercive instruments of mutual legal assistance where possible, such as using a videoconference for suspects.

In our case the warrant was issued because the statement of Paul was needed as a formal procedure in order to bring charges before the criminal court. Considering the fact that such an interrogation could be made by using other less restrictive measures such as hearing by videoconference, letter rogatory etc. the issuing of the EAW in state Z appears to be disproportionate regarding the circumstances of the case. In similar cases other member states expressed the same point of view that the EAW should not be used for the purposes of interrogating the suspect.[9]

To conclude, if this point of view were to be adopted, execution of the EAW should be refused because the measure taken is too coercive.

2. b) Regarding the second argument on the issuing of the EAW

Circumstances of the case

There is an ongoing procedure in state Z against Paul during which he was notified for a formal interrogation.

Paul's defense lawyer argues that the prosecutor in state Z has not yet taken the decision whether Paul should be prosecuted or not. In other words, he alleges that an EAW cannot be issued before the case is brought before the court for the merits to be analyzed.

Legal opinion for the judge.

This argument is not relevant. According to Article 1 paragraph 1 of the FD the EAW can be issued "*for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*". It is clear that there are two different hypotheses in which an EAW can be issued: either as a measure necessary during the criminal investigation either for the executing punishment. This interpretation has also been confirmed by the case-law of EUCJ[10].

[9] House of Lords/House of commons, Joint Committee of Human Rights Evaluation, June 2011
[10] I.B., C-306/2009 §49; Advocaten, op.cit. §28; Kozlowski C-66/08, § 31

3. a) Regarding the consequences of a potential execution of the EAW

Circumstances of the case

Paul is a national of member state X, but lives and works in member state Y for more than 12 years. National law of Y grants the privilege to its own nationals to be sent for the execution of an EAW under the condition to be returned after the trial.

Paul's defense lawyer demands that if Paul is transferred to Z he should be so under the condition that he will be returned to Y after the trial. The lawyer further states that denying this right to Paul would be discriminatory.

Legal opinion for the judge

There are two provisions regarding the situation in which the individuals that were referred in the EAW will execute the punishment on the territory of the executing state: Article 4 paragraph 6 and Article 5 paragraph 3. The EUCJ case-law has stated that the conditions for those two cases are the same[11].

According to Article 5 paragraph 3 of the FD "*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*". A resident is another Union citizen who has resided in the host Member State in compliance with the conditions laid down in the Directive no. 2004/38/EC of the European Parliament and of the Council of 29 April 2004 during a continuous period of five years without becoming subject to an expulsion measure. In consequence, Paul is a resident of member state Y.

In the case of Wolzenburg §58 the Court has stated that:" *it follows that a national legislature which, by virtue of the options afforded it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice".* Furthermore, the Court has constantly stated that the purpose of Article 4 paragraph 6 and Article 5 paragraph 3 is to

[11]Kozlowski, op.cit., § 33 and the following, Wolzenburg, C-123/08, § 57 and the following, Da Silva Jorge, C-42/11, § 31 and the following

increase the requested person's chances of reintegrating into society when the sentence imposed on him expires[12].

Still, such a restriction cannot be unlimited as the member states cannot exclude *deplane* one of the categories shown in Article 5 paragraph 3 as in the case when such privilege are granted only to the nationals, without being discriminatory on the grounds of Article 18 TFUE. The Court has expressly stated in the case of Da Silva Jorge that: "*although a Member State may (...) decide to limit the situations in which its executing judicial authority may refuse to a surrender a person who falls within the scope of that provision – thereby reinforcing the system of surrender introduced by that framework decision in accordance with the principle of mutual recognition it cannot exclude automatically and absolutely the nationals of other Member States staying or resident in its territory irrespective of their connections with it*".

In the present case as Paul lives and works in Y for more than 12 years, it is certainly easier to socially integrate him in the state Y when executing a punishment than it would be in member state Z, because of the strong bonds developed with state Y during this 12 years. Furthermore, by excluding *de plano*, the nationals of other Member States staying or resident in its territory irrespective of their connections with it, the law of the state Y is discriminatory on the grounds of nationality.

In consequence, the argument of Paul's defense lawyer is relevant if the national law does not allow other nationals to benefit from the provisions of Article 5 paragraph 3 of the FD. In this case, the national legal provision cannot be applied and the executing state should apply directly the EU law (Article 5 paragraph 3 of the FD) on the basis of its supremacy.

[12] Wolzenburg, op.cit., §52; Kozlowski, op.cit., § 45