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THE PRINCIPLE OF *NE BIS IN IDEM* IN THE CONTEXT OF EUROPEAN ARREST WARRANT: A VIEW OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF JUSTICE

ABSTRACT: In this paper, we analyze the most significant rulings of the Court of Justice of the European Union regarding the interpretation of the provisions of the Framework decision on the European arrest warrant which established the principle of *ne bis in idem* as one of the grounds for both mandatory and optional non-execution of the extradition request issued to the judicial authority of the executing Member State. Although the European arrest warrant is one of the most important mechanisms of cooperation in criminal matters between Member States, the provisions of the Framework decision that established the European arrest warrant as part of the EU law do not define precisely enough some of the key aspects of its implementation, leaving plenty of space for different interpretations and actions of national authorities, which in turn contributes to legal uncertainty and unequal application of the EU law within Member States. In this context, the European Court of Justice made some of the key points in the 2010 Mantello case and 2018 AY case, and primarily focused on issues related to the “same act” category as one of the key criteria for applying the *ne bis in idem*

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principle in transnational context. The inductive-deductive method and content analysis were used in the analysis of the cases mentioned above.

KEY WORDS: cooperation in criminal matters; European Arrest Warrant; ne bis in idem; The Court of Justice of the European Union; Mantello; AY.

1. Introduction

The European Arrest Warrant (EAW) is one of the most important, but also the most delicate mechanisms of cooperation in criminal matters between Member States of the European Union. Since its adoption, and especially after the amendments in 2009⁹, Framework Decision 2002/584/JHA¹⁰, which established the European Arrest Warrant as part of the EU legal system, has enabled acceleration of the extradition process of the citizens who are connected with criminal proceedings in another Member State, primarily due to considerable reduction of the double criminality principle¹¹, which was very common in previous acts. The court of the state executing the arrest is authorised to determine whether all procedural requirements for action have been met, without entering into the merits of a case that is pending trial or a case that is closed by the court of another Member State, making judicial cooperation under the European Arrest Warrant more flexible and automated. However, the implementation of the Framework decision in the Member States has encountered not only constitutional, but also political obstacles, especially when it comes to extraditing their own na-

⁹ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states, Consolidated version of 28 March 2009: 2002F0584-EN-28.03.2009-001.001.

¹⁰ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states, OJ192, 18.7.2002, p. 1 – 20.

¹¹ The double criminality principle implies that the criminal offence with which a person is charged must be defined as such by both the provisions of the national law of the state of citizenship and the provisions of the state demanding extradition.

tionals. For example, the Constitutional Courts of the Federal Republic of Germany, Poland, Cyprus and the Czech Republic have made cooperation on this basis dependent upon ensuring adequate protection of human rights for persons subject to an EAW, as envisaged in their own Constitutional Acts. On the other hand, some other Member States like Britain, Malta, Portugal or Denmark relied more on political reasons when contesting requests for extradition of their own nationals (Tučić 2020, 219). These and other problems called for stronger involvement of the European Court of Justice in resolving interpretative doubts over the Framework decision, which would not only contribute to a higher level of compatibility of national implementing regulations, but would also greatly improve legal certainty in EU law. Considering the fact that the European Arrest Warrant is based on the concept of international judicial cooperation, embodied in the recognition and enforcement of foreign judgements, a particularly interesting issue is the application of the *ne bis in idem* principle which prevents national courts from executing extradition requested by another Member State. In regards to this matter, the European Court of Justice made relevant observations on two occasions, first in the 2010 *Mantello* case (C-261/09) and then in the 2018 *AY* case (C - 268/17).

2. The *ne bis in idem* principle in the Framework decision on the European Arrest Warrant

Having roots in Roman civil law, the *ne bis in idem* principle is seen as one of the postulates of legal certainty and equity in criminal law matters, according to which a person cannot be prosecuted, i.e., convicted more than once for the same crime. In Article 3 of the Framework decision on the EAW, the *ne bis in idem* principle is provided as one of the grounds for mandatory non-execution of the EAW. Or, as stated in Article 3(2) of the Framework decision, the executing judicial authority shall reject an extradition request if "the requested person has been finally judged by a Member State in respect for the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of

the sentencing Member State¹². In addition to provisions of the article mentioned above, the *ne bis in idem* can be identified as a ground for refusing the execution of an extradition request by the also in Articles 4(2) and 4(3) of the Framework decision, but this time on a non-binding, discretionary basis. Article 4(2) of the Framework decision provides for the court to refuse to execute the extradition arrest warrant if the person who is the subject of the EAW is already being prosecuted for the same criminal act before the judicial authorities of the executing Member State, i.e., according to Article 4(3), if the judicial authorities of the executing Member State decide either not to prosecute for the offense on which the EAW is based or to halt the ongoing criminal proceedings against the person in question or if final judgement has been passed upon the requested person in a Member State in respect of the same acts, therefore preventing further criminal proceedings (Materljan, I. and Materljan, G. 2019, 64). This lack of clear formulation of the above provisions has left plenty of room for different interpretations, and consequently different actions of national courts, which directly compromises the principles of legal certainty and equity at the level of the European Union. Therefore, it was only a matter of time before the interpretation of these provisions would be requested from the European Court of Justice in proceedings relating to the issue referred to above.

3. The *Mantello* Case

The Italian court in Catania issued a European Arrest Warrant to the Higher Regional Court in Stuttgart against Mr. Mantello, referring to two criminal offenses: a two-year involvement in illegal drug trade within an organized criminal group, and illegal acquisition, possession, transport, sale or distribution of a controlled substance, at the

¹² Although different terminology is used, Article 54 of the Convention Implementing the Schengen Agreement contained essentially identical definitions. See: Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of the checks on their common borders. OJ L 239, 22.9.2000, p. 16 – 62.

same time and in the same places where the first crime was committed. The German court addressed two questions to the Court of Justice of the European Union within the proceedings relating to the issue mentioned above. The first question referred to the wording “same act” of Article 3(2) of the Framework Decision, that is, whether the concept expressed by the term “same act” should be interpreted on the basis of the national law of the executing Member State, or the law of the issuing Member State, or nevertheless on the basis of autonomously interpreted European Union law. As expected, since the Court of Justice favours a teleological interpretation which ensures a uniform application of EU law in all Member States, it has deprived national courts of the right to interpret the term “same act” in a transnational or cross-border context, in the light of domestic law, emphasizing that, as this is an autonomous category of the European Union law, only the EU Court of Justice is authorized to interpret its meaning. Also, as Article 54 of the Convention Implementing the Schengen Agreement and Article 3(2) of the Framework Decision have the same aim, the Court has pointed out that its earlier interpretations and views related to Article 54 of the Convention¹³ also apply to Article 3(2) of the Framework Decision. The second question was whether the act of illegal drug trade (drug trafficking) could be treated as “same act” from Article 3(2) of the Framework Decision as a membership in an organized criminal group whose main activity is drug trafficking, especially if, as it turned out, Italian investigative bodies at the time of sentencing for illegal drug trade had had evidence that Mr. Mantello belonged to an organized criminal group, but had decided not to bring this before the court and not to initiate proceedings on this basis for reasons related to investigation and operation planning. The Court of Justice has interpreted this issue as the existence of a final judgment against the requested person as an important ground for the application of *ne bis in idem*, given that in this case, the Italian investigative bodies had had evidence for the acts covered by the European Arrest Warrant (paras. 43-44). The Court of Justice has pointed out that the question of the existence of a final judgment against the requested person for the purposes of Article 3(2) of the Framework Decision is determined on the basis of the national regulations of the Member

¹³ See: ECJ, *Zoran Spasic*, 27.05.2014, C – 29/14, PPU.

State whose court rendered the judgment, and that the court decision which does not prevent further prosecution in the national legal context should not constitute an obstacle to the initiation or continuation of proceedings for the same criminal offenses in another Member State (paras. 46-47). In particular, in the present case, the Italian judicial authority, at the request of the German judicial authority, in accordance with Article 15(4) of the Framework Decision, has already stated that its previous decisions do not cover all the criminal offenses under the European Arrest Warrant and therefore the German judicial authority has no ground for the application of the principle *ne bis in idem* and refusal of extradition request (paras. 50-51). What do these views of the European Court of Justice actually mean? With regard to the first question, taking into account the marked differences in the criminal justice system between Member States, including different views on what constitutes a criminal offense, the European Court of Justice has enabled the transnational application of the *ne bis in idem* principle by depriving national courts of interpreting the term “same act” on their own. In the context of the second issue, the European Court of Justice has recognized the importance of national regulations and decisions of national judicial authorities in determining the existence of a final judgement, and has consequently transferred the legal requirements for the application of *ne bis in idem* from the national to the EU level. Or, as the Court stipulates, first the conditions for the application of a national *ne bis in idem* principle must be met, and only then can this principle be used in a transnational, EU context (Ivičević - Karas 2014, 291).

4. The AY case

The AY case is interesting not only because it focuses on additional for for applying the *ne bis in idem* principle under Article 4 of the Framework Decision, but also because the European Court of Justice was addressed by the County Court in Zagreb, which conducted proceedings against two persons for bribery and corruption, namely a former high-ranking official from Croatia, and the chairman of the board of directors of a Hungarian company. The County Court, through OS-

COC¹⁴, sent a European arrest warrant to the Hungarian side requesting the extradition of a Hungarian citizen, however, the Hungarian judicial authority refused to execute the EAW, noting that the same criminal offense had already been investigated in Hungary and had been suspended, although the requested person in this procedure had the status of a witness, not a suspect (Materljan 2019, 232). After the Hungarian authorities refused to rule on the repeated request, the County Court in Zagreb addressed the Court of Justice of the European Union in May 2017, asking for answers to a total of five questions, four of which related to the actions of the Hungarian authorities as executing authorities, while the fifth question referred to the action of the County Court in Zagreb. The question we focus on here is whether the provisions of Article 4(3) of the Framework Decision, which provide for the optional possibility of refusing extradition on the grounds of previous withdrawal or suspension of criminal proceedings for the same act in the executing State, should be interpreted as referring only to the specific criminal offense or also to the person against whom the warrant is issued, especially if we take into account that the requested person appeared as a witness in the investigation procedure in Hungary, while in the proceedings before the County Court in Zagreb the same person appears as a suspect or accused. The European Court of Justice has pointed out that a previous withdrawal or suspension of proceedings in relation to the same criminal offense in which a person from the European Arrest Warrant appears as a witness cannot be the ground for optional non-execution of the EAW, according to Article 4(3) of the Framework Decision, if the requested person appears in the warrant as a suspect. In the Court's view, if the provisions of Article 4(3) of the Framework Decision were to be interpreted only in the context of the criminal offense and not in the context of the identity of the person concerned, it would create plenty of room for national judicial authorities to refuse to act on this important principle of the EU criminal law. Also, as the grounds for non-execution of the EAW under Article 4(3) of the Framework Decision are optional, they are an exception and must be interpreted restrictively (paras. 52-57). The investigation procedure, which was suspended by the Hun-

¹⁴ The Office for the Suppression of Corruption and Organized Crime of the Republic of Croatia.

garian authorities, was being conducted against a person whose true identity is unknown, and not against a specific Hungarian citizen, hence this, *in rem* proceeding, cannot be used as a ground for non-execution of the extradition request issued by Croatian authorities. The court also referred to the fact that the Hungarian authorities ignored the repeated European arrest warrant, emphasizing the fact that the competent national authority is obliged to make a decision on every European arrest warrant issued to it, even if previous arrest warrants relating to the same person and the same offense had already been decided in that State, especially when another European Arrest Warrant is issued because the requested person is charged of a crime in the issuing State (paras. 32 - 36). So, regardless of the fact that the Hungarian authorities have already once rejected Croatia's extradition request, they were obliged to decide a new extradition request, for the simple reason that there has been a change in the procedural status of AY, and the suspect, after filing charges, has become a person accused of committing the criminal offense of bribery.

5. Conclusion

The European Arrest Warrant is one of the key mechanisms of judicial cooperation in criminal matters between Member States. Despite the progress that has been made in the past two decades, the implementation of the EAW still encounters various obstacles, which are especially evident when Member States are requested to extradite their own citizens suspected of a crime committed in another Member State. Member States often resort to various mechanisms to avoid the extradition procedure, including the possibilities provided in Articles 3 and 4 of the Framework Decision, especially emphasizing the importance of the *ne bis in idem* principle in a transnational context. In cases of insufficient precision of the provisions that regulate the application of this principle, which aims to protect the rights of persons suspected of cross-border criminal activities, there is a need for the European Court of Justice to interpret their meaning. Up to this time, the European Court of Justice has dealt in two cases with the issue of the conditions

for the cross-border application of the *ne bis in idem* principle in accordance with the provisions of the Framework Decision, in the 2010 Mantello's case and the 2018 AY's case.

The significance of the Mantello case is that the European Court of Justice took only one of the key conditions for the cross-border application of the *ne bis in idem* principle, and that is the existence of the „same act“ and the „same actions“, and exempted it from the jurisdiction of national courts and, since it is an autonomous category of the European Union law, the EU has verified itself as the exclusive interpretive authority in that context. In this way, taking into account the differences in criminal law matters between the Member States, including the differences in definitions of certain elements of criminal offenses, the Court has enabled the application of the *ne bis in idem* principle at European level, since otherwise its application would have been highly questionable. In addition, the Court has clearly stated in the Mantello case that national courts must not make procedural discrimination in the application of *ne bis in idem* in the domestic and cross-border context, and if the conditions for its application in the domestic context are met, this implies that they are met in the EU context as well. And not only that, the fulfillment of the conditions for the application of *ne bis in idem* at national level, according to the European Court of Justice, manifests itself as a kind of a „filter“ for its application at transnational level.

The AY case is significant because, in deciding on it, the Court has specified the status of the provisions of Article 4(3) of the Framework Decision, which regulate the optional possibility to refuse to act on a European Arrest Warrant. The European Court of Justice has found that, in accordance with the fact that they are optional, the provisions in question should be interpreted as strictly as possible, since otherwise, the joint fight against cross-border crime would be seriously called into question. Also, the Court specified in this case that the optional *ne bis in idem* laid down in Article 4(3) of the Framework Decision does not refer only to the criminal offense from the European Arrest Warrant, but primarily to the status of a person in criminal proceedings. Thus, if a person appeared as a witness in the proceedings before the executing State, the grounds for activating *ne bis in idem* and rejecting the

European Arrest Warrant in the light of Article 4(3) of the Framework Decision do not exist if the person is treated as a suspect or accused. In addition, if the requesting State reissues the European Arrest Warrant, the change of the status of a person in criminal proceedings presents a sufficiently new fact for the executing State to decide again on a repeated extradition request. Thereby, the European Court of Justice „forces“ Member States to obtain more intensive cooperation on the basis of the European Arrest Warrant and monitor changes in all relevant legal facts of cross-border or transnational cooperation, even those related to the status of the person sought.

These cases are only the first jurisprudential steps needed to gradually crystallize the relevant provisions of the Framework Decision on the European Arrest Warrant, including the application of the *ne bis in idem* principle. Given that the application of *ne bis in idem* is far more complex in a cross-border context than in a domestic one, but also taking into account the importance of police and judicial cooperation in criminal matters in the EU, greater judicial activism at the European Court of Justice is expected so that by resolving potential dilemmas the joint fight against cross-border crime can be made more effective.

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