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## Appeal against the European Arrest Warrant and the reasons for a detention of the surrendered person in the practice of Slovak judicial organs

### Introduction

The paper deals with the issue of an appeal against the European Arrest Warrant (“EAW”), in particular with certain problematic issues that have occurred during its use in practice and why this legal tool “has faced” so many judicial decisions. The paper is scoped very narrow and is not meant to cover all the hot and touchy issues related to the EAW. The reason is limited space, specific purpose of this paper and the effort to support or challenge each argument by concrete judicial decision. Notwithstanding that we do not want to conclude either that pointed issues presented further are the only ones or so underestimate the importance e.g. *ne bis in idem* issue, a relation to the Schengen Information System, the application of the Art. 6 of the ECHR<sup>1</sup> and the surrender procedure or the way of filling the EAW.

The Paper puts stress mainly on the procedural rather than substantive issues. The reason of this is the awareness that in most cases, were the procedural provisions those that had been challenged before the national and international courts and caused the disputes among the professionals dealing with this topic. Besides that, the paper shows particular procedural practice of national courts that may

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<sup>1</sup> Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13 (further mentioned as ECHR). [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

interfere with the human rights of the surrendered person.

### The appeal against the execution of the European Arrest Warrant

The issue of an appeal against the decision executing the EAW has not been analyzed deeply yet. If yes, it has been just mentioned while analyzing the decision of the German Constitutional Court<sup>2</sup> (“the Court”). The most prob-

lematic question from a human rights perspective is the absence of any provision related to the appeal in the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)<sup>3</sup> and secondly it is the restricted space for the non-execution of the EAW.<sup>4</sup>

It is clear that the Court has ruled against the provisions of the Framework Decision in the second part of its opinion.<sup>5</sup> The attention in this chapter will be given to the formal procedure *stricto sensu* and time limits set up by the Framework Decision, elaborating on the first part of the Court decision and developing its thoughts.<sup>6</sup>

Our view is also supported by the *opinio iuris* of the Supreme Court of the Slovak republic. It has ruled in its decision that

The revision in the procedure to execute or not to execute the EAW is restricted exclusively just to examination of the existence or non existence of the reasons for the non-execution of the EAW listed in the Article 4 of the Act<sup>7</sup>, when just the existence of such a reason is a reason not to execute

<sup>2</sup> Compare e.g. Mölders, S., European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005, GERMAN LAW JOURNAL Vol. 07 No. 01, p.47 and 51. Blakxtoon, R., Van Ballegooij, W., Handbook on European arrest Warrant, T.M.C. Asser Press, 2005, p. or Keijzer N., Van Sliedregt, E., The European Arrest warrant in Practice, T.M.C. Asser Press, 2009.

<sup>3</sup> Followingly mentioned as the Framework Decision. Compare the text of the Framework Decision

<sup>4</sup> Article 3 and Article 4 of the Framework Decision.

<sup>5</sup> Judgment of Federal Constitutional Court of Federal Republic of Germany dated 18 of July 2005, file reference 2BvR 2236/04. Para. 2.2. [http://www.bverfg.de/en/decisions/rs20050718\\_2bvr223604en.html](http://www.bverfg.de/en/decisions/rs20050718_2bvr223604en.html)

<sup>6</sup> Ibid. Para. 2.1. and the Statement.

<sup>7</sup> Zákon č. 403/2004 Z.z. o európskom zatykácom rozkaze a o zmene a doplnení niektorých zákonov (Act n. 403/2004 of the Legal Order about the European arrest warrant and about amendments of other acts).

Articles 3 and 4 of the Framework decision. Slovak republic has

the EAW. In the case of non existence of such reason, the Court is obliged to decide to execute the EAW.<sup>8</sup>

Concerning the appeal, the Framework decision includes only term “final decision”<sup>9</sup>. It is questionable if the term “final decision” refers to the first instance decision or if it covers the appeal decision against the execution of the EAW. If yes, following this line and using the *argumentum accontrario*, it could indicate the possibility of appealing the decision executing EAW foretold the final decision. The interpretation of the mentioned Articles allows considering as final decision valid first instance decision as well the appeal decision dismissing an appeal. If it is the appeal decision, the situation becomes more complicated. Usual procedure of the Appeal Court issuing the decision in a particular case is ruling related just to the merit of an appeal – *ne ultra petittum rule*.<sup>10</sup> In other words the Appeal court is entitled and obliged to decide only the prima facie appeal case and not to go beyond it. It means implicitly that the Appeal Court would not only rule concerning the appeal but would State again that EAW would be executed, if it would like to adopt the “final decision” in the line with the Framework decision.

If the Framework Decision considers as “final decision” valid first instance decision, the situation is problematic as well. According the Article 23.2 of the Framework Decision the person shall be surrendered no later than 10 days after the final decision on the execution of the European arrest warrant.<sup>11</sup> The main concern is the strict time limit for the execution and its compliance with the court administration. It is impossible to comply with this time limit if the Appeal Court will decide only the merit of an appeal and send it back to the first instance court to validate the first instance decision.

As it has been suggested previously, the Framework Decision has not included any provisions concerning the revision or appeal against the decision executing the EAW. Notwithstanding that the majority of the Member States included the provision concerning an appeal or revision against it including reasons enlisted in the Article 3 and Article 4 of the Framework Decision.

Concerning the reason of *ne bis in idem principle* stated in the Article 4.2 of the Framework Decision, the Supreme Court of the Slovak republic has changed the decision of the County Court in Banská Bystrica when it has withdraw from the decision to execute the EAW issued by the Landgericht in K., Austria those counts, for which the person has been prosecuting also in Slovak republic. The EAW was executed in the rest number of counts.<sup>12</sup>

implemented all reasons for non-execution as mandatory, see the Article 14 of the Act about the EAW (Note of the authors.)

<sup>8</sup> The decision of the Supreme Court of the Slovak republic on 22. July 2008, n. 4 Tost 7/2008. Also compare with the decision of the Supreme Court of the Slovak republic on 5. August 2008, n. 4 Tost 8/2008

<sup>9</sup> Articles 17.2, 17.3, 17.5 and 23.2 of the Framework Decision.

<sup>10</sup> Detached from the appeal system, where one can challenge the matters of fact or cassation system where one can challenge just the matter of law.

<sup>11</sup> Article 23.2. of the Framework Decision.

<sup>12</sup> The decision of the Supreme Court of the Slovak republic R 26/2008.

It has not been solved in the Framework Decision as well if the appeal should have or should not have the *suspensive effect*, what means if the lodged appeal postpone the validity of the decision to execute the EAW or not. The practical impact of this issue is huge. If the appeal would not have suspensive effect the decision to execute the EAW can be executed immediately and the appeal decision would be adopted just after the surrender procedure, when the person would be located abroad. On the other hand if the *suspensive effect* of the appeal is granted, the person shall not be surrendered until the appeal court decides the case.

## National legislation

The Slovak republic has implemented the Framework decision by the Act 403/2004<sup>13</sup>. The statute considers the term “final decision” as valid first instance decision<sup>14</sup> and count the time limit since the validity of the first instance decision.<sup>15</sup> As one can see the Slovak legislators have chosen the second possibility. Trying to avoid the problems in practice-the 10 day time limit, they have adopted that the Appeal court<sup>16</sup> is obliged to rule concerning the appeal and cumulatively decide that the EAW shall be executed again.<sup>17</sup> Consequently the decision consists of two statements. The first one relates to the lodged appeal and the second one repetitively States that the EAW shall be executed. This procedure allows counting the 10 day time limit pursuant the Article 23.2 of the Framework Decision from issuing the appeal decision. This solution is little bit odd and do not fit into the usual appeal procedure. One may say that the extraordinary appeal procedure has been created and designed to extend and maintain the time limit for the surrender. This artificial and unusual practice only complicates and worse the whole concept of the EAW.

The Supreme Court of the Slovak republic has brought more light to the problem, when it has ruled that the appeal against the decision not to execute the EAW is not admissible.<sup>18</sup> Such a revolutionary ruling has not kept for a long time, even it has followed the *prohibition of reformatio in peius principle*, in other words that the position of surrendered person cannot be aggravated by the court decision if the court has decide previously that the EAW will not be executed.

The Supreme Court of the Slovak Republic has ruled later that such a limited possibility of appealing is in-

<sup>13</sup> Zákon č. 403/2004 Z.z. o európskom zatýkacom rozkaze a o zmene a doplnení niektorých zákonov (Act n. 403/2004 of the Legal Order about the European arrest warrant and about amendments of other acts) (“Act about the EAW”)

<sup>14</sup> Ibid. Article 22.4 of the Act

<sup>15</sup> Ibid.

<sup>16</sup> According the Article 22.5 of the Act, the jurisdiction over the appeal against the EAW has the Supreme Court of the Slovak republic.

<sup>17</sup> Ibid. Article 22.5 of the Act. It has to be noted that the „first decision to execute the EAW adopts the first instance court, so consequently the Appeal court rules the same, if it decides to confirm the decision.

<sup>18</sup> See decision R 20/2007.

sufficient and ask indirectly to adopt an amendment concerning the possibility to lodge an appeal also against the Decision not to execute the EAW.<sup>19</sup>

Finally one note left- the implementation of the EAW in the Slovak republic grants the *suspensive effect* of the lodged appeal, but as it has been indicated only in the case of the decision to execute the EAW.

## The Detention in the EAW procedure and the practice of the Slovak judicial organs

The Framework decision states that the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person and in specific cases the time limits may be extended by a further 30 days.<sup>20</sup>

This limit of 60 days or 90 days is obligatory counting from the moment of arrest. It is not clear if the term arrest includes the moment of restriction of personal freedom- capture or the moment of the decision on arrest that is usually adopted up to 48 hour delay<sup>21</sup> since the capture by police forces occurred.

Slovak national legislation is counting the time limit from the capture of the person, which seems to meet the human right requirement more than the vague explanation used in the Framework decision.

Notwithstanding that different application problems occurred. It has been the wrong supplementary use of the Criminal Procedure Code to the Act about the EAW, related mainly to the reasons of detention.

According the Act about the EAW the detention is obligatory when the person should be surrender for one of the 32 offences listed in the Article 2.2 of the Framework decision<sup>22</sup> or if the person gave the consent with the surrender pursuant the Article 13 of the Framework Decision.<sup>23</sup>

In other cases the Court can decide to detain the person only if there are concrete circumstances to presume that the surrendered person would flee, hide to avoid the prosecution or imposed punishment.<sup>24</sup>

In reality, the courts used to detain the surrendered persons because of reasons enlisted in the Criminal Procedure Code<sup>25</sup> except using the Act about the EAW that specifically exclude the use of different Act, if the Act about the EAW includes the special provision.<sup>26</sup>

The Supreme Court of the Slovak Republic has ruled concerning this issue that the Act about the EAW is *lex specialis* and the Criminal Procedure Code is *lex*

*generalis*, therefore the *lex specialis* provisions concerning the detention of surrendered person have to be used instead of *lex generalis* provisions that are included in the Criminal Procedure Code and therefore these reasons shall not be used as reasons for a detention in the procedure pursuant the Act about the EAW and if so, such a person has to be released and can be detained only from the reasons listed in the Act about the EAW.<sup>27</sup>

Unfortunately, the Slovak implemented legislation has failed to establish the possibility of the provisional release pursuant the Article 12 of the Framework decision<sup>28</sup> consequently there is no possibility for the financial caution or a word of a reliable person etc.

### Conclusions

If one read articles, books and observations concerning the EAW, words like revolutionary and new occur. The EAW has lived up to expectations. It has made surrender procedure faster, more effective and less political, and has given new rights, such as the deduction of time spent on remand from the final sentence served. The idea of the EAW has proved its reasonability and vitality and appears as good tool in the fight against crime.<sup>29</sup> Apart from that the path founded by the EAW is only possible to protect the 4 basic EU freedoms- free movements of persons, goods, services and capital – as basic prerequisites of sustainable development of the EU. But in the same time it shall not breach other human rights and freedoms. From this perspective there may still be room for improvement and adjustment<sup>30</sup> as the paper shows.

Notwithstanding that, the practice has shown many gaps and ambiguity in the wording of the Framework Decision mostly in the procedural standards among the Member States. The primary goal to reach nowadays is to meet the same procedural standards among the Member States.<sup>31</sup>

Presented paper gives a rough description about the appealing procedure in one of the EU Member State and the legal framework of the detention during the procedure to execute the EAW. Practitioners and scholars from other EU Member States will probably realize that the practice in their state varies. Therefore one can say, that the Framework Decision has rather created the net of 27 bilateral surrender procedures than one unified european surrender procedure, that should have replaced the European Extradition Convention. ■

<sup>27</sup> Decision of the Supreme Court of the Slovak republic R 33/2008

<sup>28</sup> Ibid. Compare article 17.

<sup>29</sup> KOLESÁR, JURAJ: MEANS AND ACTION TO COMBAT CRIME EFFECTIVELY WHILE RESPECTING HUMAN RIGHTS IN: SERIOUS CRIME AND THE REQUIREMENT OF RESPECT FOR HUMAN RIGHTS IN EUROPEAN DEMOCRACIES. – STRASSBOURG : COUNCIL OF EUROPE, 1996. – S. 59–65 [SERIOUS CRIME AND THE REQUIREMENT OF RESPECT FOR HUMAN RIGHTS IN EUROPEAN DEMOCRACIES. INTERNATIONAL CONFERENCE. Taormina, 14.–16. 11. 1996]

<sup>30</sup> BLAKXTON, R., VAN BALLEGOOIJ, W., HANDBOOK ON EUROPEAN ARREST WARRANT, T.M.C. Asser Press, 2005, p. 2 also see and compare KOLESÁR, JURAJ: ZÁSADA SPRÁVODLIVÉHO PROCESU POD TLAKOM IN: BULLETIN SLOVENSKEJ ADVOKÁCIE. – Roč. 14, č. 11 (2008), s. 47–48

<sup>31</sup> Ibid, p. 3

<sup>19</sup> The Decision of the Supreme Court of Slovak republic on 24. June 2008. 5 Tost 8/2008.

<sup>20</sup> Article 17.3 and 17.4 of the Framework Decision.

<sup>21</sup> ECHR judgment in the case Aquilina vs. Malta 29.April 1999, n.25642/94, para 51.

<sup>22</sup> Article 4.8 of the Act about the EAW.

<sup>23</sup> Ibid. Article 17.3

<sup>24</sup> Ibid. Article 17.1.

<sup>25</sup> Article 71.1 of the Criminal Procedure Code.

<sup>26</sup> According to the Article 1.2 of the Act about the EAW