

## Varia

### **Superior Regional Court Munich, 1<sup>st</sup> Criminal Senate: General Public Prosecution Office v. K. – Order of 15 May 2013 – OLG Ausl. 31 Ausl. A 442/13 (119/13)\***

#### **Legal Provisions**

Art. 6 Treaty on European Union (“TEU”); Art. 23 German Basic Law; § 73 second sentence German Act on International Cooperation in Criminal Matters (“German Act”)

#### **Keywords**

Limits to the primacy of European Union law; European arrest warrants; in absentia proceedings; revocation of probation

#### **Guiding principles**

1. Before executing European arrest warrants, German authorities and courts still examine on a case-to-case basis whether the execution would violate the principles laid down in Article 6 TEU (§ 73 second sentence German Act; distinction from Court of Justice of the European Union (“ECJ”) – Grand Chamber –, Judgment of 29. January 2013 – C 396/11 „Radu“ para. 36 and Judgment of 26 February 2013 – C-399/11 „Melloni“ para. 63; concursal with German Federal Constitutional Court – 1<sup>st</sup> Senate –, Judgment of 24 March 2013 – 1 BvR 1215/07 para. 91).

2. The substitution of a probation measure by a prison sentence in absentia under Bulgarian law does not violate principles guaranteed under Article 6 TEU provided that the convicted person has been personally summoned to the proceedings and has been appointed a public defender.

#### **Order**

The Bulgarian national K.’s extradition from Germany to Bulgaria based on the European arrest warrant issued by the Regional Prosecutor V./Bulgaria on 5 February 2013 for the purpose to execute a prison sentence of 10 months is permissible.

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\* Translation by Prof. Dr. Joachim Vogel.

## The facts

On 10 July 2010, the extraditee, a Bulgarian national and resident of V./Bulgaria, drove the motor vehicle Citroen Xantia, registration number (...), in V./Bulgaria, with a blood alcohol concentration of 1.65 per thousand, as properly determined by the chemical expert report no. 889/12 July 2010.

Under Article 343 b Bulgarian Criminal Code, a person who drives a motor vehicle with alcohol concentration in his blood exceeding 1.2 per thousand, ascertained by the established procedure, shall be punished by deprivation of liberty for up to one year. The extraditee was convicted of an offence of drunk driving. Originally, the sentence was a probation measure under Article 42 a Bulgarian Criminal Code which reads in the relevant parts:

*“(1) Probation is a system of non-custodial measures for control and intervention that shall be imposed separately or collectively.*

*(2) Probation measures shall be:*

*1. Compulsory registration at the current address;”*

*The extraditee did not comply with the probation measure. On 20 April 2012, the District Court V./Bulgaria ordered that the probation measure be substituted by imprisonment of 10 months under Article 43 a No. 2 Bulgarian Criminal Code which reads:*

*“If the sentenced offender fails, without a valid reason, to serve the probations measure imposed on him/her, at the proposal of the competent Probation Board the court may:*

*1. (...)*

*2. Substitute probation, fully or partially, for deprivation of liberty (...).”*

The proceedings before the District Court V./Bulgaria took place in absentia. Whereas the Regional Prosecutor V./Bulgaria had no data available on the day, month, year, the court minutes establish that the extraditee was summoned to the proceedings and informed “on the scheduled date and place of the proceedings as well as on the possibility that such [i.e. in absentia] orders can be issued if he does not appear at the court hearing.” Furthermore, the court had appointed a public defender.

On 5 February 2013, the Regional Prosecutor V./Bulgaria issued a European arrest warrant against the extraditee for the purpose of the execution of the 10 months prison sentence.

On 13 April 2013, the extraditee was controlled by the police at Munich main station, arrested and informed of his rights pursuant to §§ 112 et seq. German Code of Criminal Procedure and Article 36 Vienna Convention on Consular Relations.

On 14 April 2013, the extraditee was brought before the judge of the Local Court of Munich. He stated that he had driven under influence and had caused an accident; that he had been subject to a probation measure which had then been revoked because he did not comply with registration requirements due to a change of residence; that he had gone to Germany in 2012; that he lives in H./Germany, with his future wife; that he had not worked in Germany, but lived on his savings; and that he wanted to start a German language course. He reserved the right to challenge his extradition, did not agree to an expedited extradition, did not waive

the speciality rule, and requested a public defender. On 25 April 2013, the Senate issued a national extradition arrest warrant based on the European arrest warrant.

Now, the General Public Prosecutor moves to declare the extradition permissible.

### The law

The extradition is permissible (§§ 29, 32 German Act).

The European arrest warrant fulfills the formal requirements pursuant to § 83 a German Act.

The extradition is also permissible on the merits.

The extraditee is not a German national so that the requirements pursuant § 80 German Act must not be met.

The offence for which extradition is sought satisfies the double criminality requirement and constitutes an extraditable offence, § 81 no. 2, § 3 German Act. The extraditee's acts would constitute a criminal offence under § 316 German Criminal Code and be punishable by imprisonment of up to 1 year. In Bulgaria, the sentence of 10 months imprisonment is yet to be fully enforced.

§ 83 no. 3 German Act – provision on in absentia judgments – does not hinder an extradition. The Senate has no evidence that the initial conviction for drunk driving took place in absentia. The subsequent court order which substituted the probation measure by imprisonment (which, from the point of view of German criminal law, equals the revocation of probation) was issued in absentia but must be distinguished from the initial judgment. It is this initial judgment which forms the pertinent basis for an extradition request that seeks extradition for the purpose of executing a prison sentence after probation has been revoked (see Superior Regional Court Celle, Order of 14 March 2012 – 1 Aus 4/12, para. 12; Superior Regional Court Berlin, Order of 28 July 2012 – (4) 151 AusLA 109/12 (205/12), para. 9; but also Superior Regional Court Stuttgart, Order of 28 January 2005 – 3 Ausl. 76/03, *Strafverteidiger* vol. 25 (2005) p. 284).

In such cases, the proceedings must only meet the requirements of § 73 second sentence German Act (cf. Superior Regional Court Celle and Berlin, loc. cit.) which stipulates that extradition and legal assistance in criminal matters within the European Union are impermissible if the execution would violate the principles laid down in Article 6 TEU which has to be examined on a case-to-case basis.

§ 73 second sentence German Act is applicable national law and has to be observed by German authorities and courts notwithstanding the recent judgments of the Grand Chamber of the ECJ of 29 January 2013 – C-396/11 "Radu" and as of 26 February 2013 – C-399/11 "Melloni".

The ECJ has decided that "Member States may refuse to execute [a European Arrest Warrant] only in the cases of mandatory non-execution provided for in Article 3 [of the Framework Decision on the European arrest warrant, FD-EAW] and in the cases of optional non-execution listed in Articles 4 and 4a [FD-EAW]"

(see C-396/11 “Radu” para. 36), and that a Member State must not rely on national constitutional provisions to refuse execution of a European Arrest Warrant where these national constitutional provisions afford an higher level of protection than the Charter of Fundamental Rights of the European Union (cf. C-399/11 “Melloni” para. 63). It may well be discussed whether these decisions imply a rejection of human rights related grounds of refusal such as stipulated in § 73 second sentence German Act which, in Germany and other Member States, have been based on Article 1 (3) FD-EAW. It may also be discussed whether the ECJ has fundamentally rejected the notion, notably developed by General Advocate Sharpston, that the execution of a European Arrest warrant may be refused by the executing Member State if it can be proven that the human rights of the extraditee were or will be violated in the issuing Member State (Opinion of Advocate General Sharpston delivered on 18 October 2012 – C 296/11 „Radu“ para. 97).

However, the ECJ jurisprudence would not imply that § 73 second sentence German Act would be rendered inapplicable by virtue of the primacy of European Union law. While it is true that national law must be interpreted in conformity with framework decisions – here the FD-EAW –, this does not suggest that domestic law be interpreted clearly *contra legem* (see ECJ – Grand Chamber –, Judgment of 16 June 2005 – C-105/03 „Pupino“ para. 47). In addition and at least until 1 December 2014, framework decisions have no direct effects (Article 34 (2) second sentence lit. b) TEU-Amsterdam, Articles 9 and 10 (2), (3) Protocol on transitional provisions to the Treaty of Lisbon); even after this date, direct effects seem doubtful to the extent that they limit individual rights.

Further, ECJ judgments must not, as part of a cooperative relationship between the ECJ and national courts, “be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law’s constitutional order” (German Constitutional Court – 1<sup>st</sup> Senate –, Judgment of 24 April 2013 – 1 BvR 1215/07, para. 91; translation provided for in the official English press release). Accordingly, it must not be presumed that the ECJ intended to make national courts and authorities execute European Arrest Warrants even where they, or the criminal proceedings upon which they are based, evidently violate the fundamental rights and freedoms of the extraditee as they are spelt out in the Charter of Fundamental Rights of the European Union or the European Convention for the Protection of Human Rights and Fundamental Liberties. Indeed, states must not lend a willing hand to evident human rights violations by other states; this also and in particular holds true within the European Union, which constitutes an area of freedom, security and justice; and certainly mutual recognition must not be a cloak to mutually recognize human rights violations. Once it would become clear that the ECJ would intend a different result, the Senate would, with a view to Article 6 TEU, ask the *ultra vires* question and, with a view to Article 23 German Basic Law, the question whether the identity of the German constitutional order be impaired; this would oblige the Senate to refer these questions to the

German Constitutional Court (see German Constitutional Court, Judgment of 30 June 2009 – 2 BvE 2/08 u. a., para. 241, Official Series vol. 123 p. 267 seq.).

It is therefore necessary to examine the Bulgarian European arrest warrant in the light of § 73 second sentence German Act. This, however, does not render the execution impermissible. The extraditee had been summoned to the Bulgarian proceedings; he had also been appointed a public defender. He thus enjoyed the right to be heard, and the proceedings constituted a fair trial. Also under German law, it is not necessary to hear a convicted person in personam before revocation of probation (see § 453 (1) second and third sentence German Code of Criminal Procedure). Neither does the Bulgarian decision appear arbitrary or grossly disproportionate. In particular, the substitution order is not merely based on the failure to comply with a registration requirement after a change of residence. Rather, the probation measure of compulsory registration at the current address of residence (Article 42 a (2) no. 1 Bulgarian Criminal Code) implies that the convicted person be subjected to a probation officer and that he or she shall report to him or her (see Article 42 b (1) Bulgarian Criminal Code). If a convicted person evades probation supervision and if, as a consequence, probation is revoked, there is no violation of the European *ordre public* in the sense of § 73 second sentence German Act.

Finally, the decision of the General Public Prosecutor not to invoke a ground of refusal under § 83 b (2) no. 2 lit. b) German Act concerning foreigners residing in Germany is free from errors in discretion in the light of the yet poor integration of the extraditee in Germany.

It is so ordered.

Wolf-Stefan Wiegand, Chief Justice

Wolfgang Distler, Justice

Prof. Dr. Joachim Vogel, Justice and Rapporteur

