

Jurisprudence of the Court of Justice on the effective access to justice

Ensuring cross-border justice for all in the EU: sharing practices and experiences from the ground

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I would like to start my presentation by recalling the four core freedoms (free movement of goods, workers, capital and services) that the European Union is built upon. I have chosen to remind of them not because they are enshrined in the EU Treaties, but because these freedoms have a very direct relevance to our discussion. They imply that cross-border movement of persons, goods and services have long become an inherent part of our daily lives. This has inevitably led us all to an awakening discovery that the advantage of cross-border movement bring along the saddening reality of an ever increasing number of cross-border disputes.

The EU and its Member States have invested a lot of efforts in laying down rules for mutual cooperation. However, one must be very clear that none of these instruments will be able to eliminate the disputes altogether. They may only assist the parties involved and the national authorities in resolving them in a more efficient manner.

In other words, if we cannot avoid disputes, we must get prepared to resolve them! This is why conferences as the one we are having today are so important, as they allow for an open exchange of views. For this reason, would like to thank the Presidency of the Council of the European Union, the Fundamental Rights Agency and the Norway Grants for their effort to bring us all here today.

I personally do not foresee the question of cross-border disputes losing its importance in any foreseeable future, so I can only hope that the forum for discussions will remain.

As discussions during our conference will focus on cross-border justice in criminal matters, I will use the time given to me for bringing your attention to some non-exhaustive examples of jurisprudence of the Court of Justice of the European Union.

I am afraid I will not be very original by picking cases related to the European Arrest Warrant (EAW). I have done so not so much because it has been considered as the “jewel in the crown” in the field of police and judicial cooperation in criminal matters. But rather because it forms an intrinsic part of cross-border justice in criminal matters, while profoundly affecting fundamental rights, such as the right to liberty and security of a person and the right to a fair trial. The effective functioning of this tool is essential to combat serious cross-border crimes

¹ I would like to thank the lawyers at my cabinet Ms Vineta BEI and Ms Céline REMY for their invaluable assistance in preparing the presentation.

that are on the rise in the EU, such as cybercrimes, complex white collar crimes and tax fraud, terrorism and other forms of international organized crime.

I will also mention a couple of interesting cases related to the right of translation and interpretation. There are still very few cases on this subject, as the transposition deadline for the relevant directive has expired relatively recently (the deadline expired on 27 October 2013, but some Member States faced difficulties in meeting the deadline).

The issues of the effective access to justice before the Court of Justice (CJEU)

Challenge:

As you may already be aware, the Court of Justice in its recent case-law on the execution of EAW has faced an increasing challenge to find a balance between security/efficiency and protection of fundamental rights in criminal law proceedings:

- (i) Need to ensure efficiency = quick dealing with EAW and avoid risk of impunity BUT
- (ii) Need to respect the fundamental rights enshrined in the European Convention on Human Rights (ECHR) and EU Charter (see preamble of all criminal law package directives).

Cases before the CJEU have revealed, how difficult it is to ensure the balance between

- (i) the respect of the fundamental rights in general and, in particular, of the minimum rules established by the EU in criminal proceedings (e.g. the provisions of the five directives adopted to implement the Roadmap on Procedural Rights of 2009), and
- (ii) the full compliance with the procedural requirements laid down in the EAW framework decision, including, in particular, the strict deadlines.

Case-law of the CJEU:

European Arrest Warrant (EAW)

1. **Originally, CJEU adopted a more efficiency-oriented approach**, by adopting the view that the principle of mutual trust creates a presumption of compliance with fundamental rights obligations for the Member States: the executing State does not have to verify compliance with fundamental rights guarantees in the issuing State. The issuing State might refuse the execution based only on grounds expressly mentioned in the framework decision:

- see case C-396/11, **Radu**, 29 January 2013, Grand Chamber : the executing State may not refuse to execute a EAW on the ground that the person concerned had not been heard before the issue of this EAW in the issuing State;
- see case C- 399/11, **Melloni**, 26 February 2013, Grand Chamber : if the EAW has been issued in criminal proceedings in absentia, the executing State may not make the execution of such EAW conditional on the possibility of reviewing the conviction handed down in absentia in the issuing State.

2. **More recently, the CJEU has adopted a more flexible approach**, favoring the protection of fundamental rights:

- See case C-168/13 PPU, **Jeremy F.**, 30 May 2013, on the extension of the EAW for offences committed prior to the issuance of the EAW and not addressed in the initial EAW. The CJEU ruled that the provisions of the EAW framework decision do not prevent the decision on the extension of the EAW being subject to an appeal with suspensive effect in the executing State, provided, in substance, that the appeal proceedings do not exceed the time limit of 90 days laid down in article 17 of the EAW framework decision (60 days to execute the EAW, with a possible 30 day extension).
- See case C-237/15 PPU, **Lanigan**, 16 July 2015, Grand Chamber. This case was brought by the Irish court in charge of executing the EAW issued by the United Kingdom (Public Prosecution Service for Northern Ireland) in respect of Mr Lanigan who was wanted on murder charges in the UK. Arrested and detained in 2013, Mr Lanigan remained in custody 30 months before the request for a preliminary ruling was sent by the Irish court to the CJEU, thus exceeding the time-limits provided in the EAW framework decision for the adoption of a final decision on the execution of this EAW.

The CJEU had to address two questions of the consequences of a failure to observe these time-limits, in particular whether, in such a situation:

- (i) the decision on the execution of the EAW can still be adopted and,
- (ii) the person concerned should be released from detention or not.

The CJEU ruled, on the first question, that the national authorities are required to continue the execution procedure for a EAW and to take a decision on its execution, even where the time-limits prescribed have expired, and, on the second question, that a person held on the basis of a EAW awaiting release can be held in custody only in so far the total duration of his custody is “not excessive”.

► Further question related to this case: Should the answer to the second question be read in a way that there is, in fact, no real deadline to execute the EAW and no obligation to release a detained person and that, consequently, people could effectively end up facing indefinite detention without trial? The answer to this question would be negative. The deadline is there, although subject to the objective appreciation of the concrete case at hand, taking into account the rules on the detention set out in Article 5 ECHR as interpreted by the Strasbourg Court. It means that a person can only be detained if the EAW procedure is being carried out with ‘due diligence’. The national authorities have to consider all the factors, including any lax behavior by the authorities, the conduct of the person concerned himself, the possible sentence, the risk of absconding and the huge overrun of the deadlines.

- See joint cases C-404/15 and C-659/15, Aranyosi and Căldăraru, 5 April 2016, Grand Chamber, on the possibility for the executing State to refuse the execution of EAW, given the poor conditions of detention in the issuing State. This case raised the question of the possibility for the executing State to invoke a ground of refusal which is not explicitly provided in the EAW framework decision, namely the risk of inhuman or degrading treatment in the issuing State, within the meaning of article 4 of the EU Charter of fundamental rights and Article 3 ECHR.

The CJEU in this case did not follow the opinion of AG Bot and accepted such new limit to the execution of a EAW. This new ground of refusal is however subject to a double verification:

- a) existence of “information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention”. That information may be obtained “from, *inter alia*, judgments of international courts, such as judgments of the ECtHR, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN” (para. 89), and
- b) “a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State” (para 92).

If the executing State concludes that there is a risk for the individual, it must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a “reasonable time”, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

► Further question related to this case: What is a “reasonable time” to examine the risk of inhuman or degrading treatment in the issuing State (how to combine this case-law with the Lanigan solution)? What if a violation of fundamental rights has taken place before the EAW is issued (as opposed to a mere risk of a violation) – can the executing State take this into account too? Is risk of inhuman or degrading treatment the only additional ground for refusal of execution of EAW, or it may be extended to other cases (to any so-called absolute right or to any serious human rights violation)? What would be the consequence, if the executing State does not comply with the obligation to assess the situation in the issuing State?

- **Last but not least**, see case C-182/15 Petruhhin case, 6 September 2016, Grand Chamber. In this case, the CJEU replied to the question, whether the protection against extradition which Latvian nationals enjoy under national law and under a bilateral agreement with the Russian Federation must, under the rules of EU Treaties, be extended to nationals of other member States.

This case is of a particular **importance for two reasons**. **First**, in this case the CJEU has further elaborated on the level of protection enjoyed by citizens (freedom of movement, principle of non-discrimination and protection from extradition of nationals), while combating impunity for serious crimes. The CJEU in this case chose to apply the principle ‘*aut dedere, aut judicare*’ (either extradite or prosecute) in the light of principle of mutual cooperation, by reminding that Member States have jurisdiction to prosecute for extraterritorial offences committed by their nationals and that EAW ‘is the first concrete measure in the field of criminal law (...) as the ‘cornerstone’ of judicial cooperation’ (para.43). Otherwise, where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the right enjoyed by EU nationals not to be extradited to State, where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Second, this case is of a particular interest, as CJEU had to deliver an opinion after the person was released and subsequently absconded, because the maximum time-limit for detention provided by national law had expired.

► Further question related to EAW: What can be done to ensure better efficiency of EAW? The mentioned examples demonstrate that we face increasing difficulties to ensure proper functioning of EAW, so as to comply with the time-limits of execution of the EAW or to the prolongation of provisional detention, while ensuring the full respect of those minimum rules for the persons concerned and thus, among other things, their effective access to justice. This also implies a discussion on possible ways to ameliorate proceeding before the CJEU, as proceedings require time (in some cases even the urgent “PPU procedure” may not be able to ensure a timely response²).

Right to translation and interpretation

- In the recent case C-216/14 Covaci, 15 October 2015, CJEU commented on the scope of the right to translation and that of the right to information about accusation that affects deadlines for bringing an appeal for penalty orders adopted in absentia.

² In the Petruhhin case it was not the PPU procedure which was applied because Mr Petruhhin was released, but, for example, in the Lanigan case it took a half a year for the Court of Justice in the PPU procedure to give the answer to the national court.

CJEU ruled that the right to interpretation and translation in criminal proceedings must be interpreted as not precluding national legislation that does not permit the individual against whom a penalty order has been made to lodge an objection in writing against that order in a language other than that of the proceedings, even though that individual does not have a command of the language of the proceedings, provided that the competent authorities do not consider, in accordance with Article 3(3) of that directive, that, in the light of the proceedings concerned and the circumstances of the case, such an objection constitutes an essential document in criminal proceedings. At the same time, CJEU recalled that the Directive on the right to interpretation and translation in criminal proceedings lays down only minimum rules, leaving the Member States free, as recital 32 in the preamble to that directive states, to extend the rights set out in that directive in order to provide a higher level of protection also in situations not explicitly dealt with in that directive. As concerns the right to information about charges, CJEU examined national rules imposing the obligation on the accused person to appoint a person authorized to accept service of the penalty order. According to the national law in question, the period for lodging an objection against that order was running from the service of the order on that authorized person, not on the accused. CJEU found that the provisions of the Directive on the right to interpretation and translation in criminal proceedings that must be implemented in a way that accused person does in fact have a benefit of the whole of the prescribed period for lodging an objection against that order.

► Further question related to this case: Further reflection is necessary on the CJEU conclusions as to the extent of one's right to oral interpretation or written translation from the perspective of the effective right to defend oneself, in particular, its conclusion that provisions of the Directive concerns, in principle, only the written translation into the language understood by the person concerned of certain documents drawn up in the language of the proceedings by the competent authorities (i.e., not by the accused).

- As we meet here today, CJEU is holding a hearing in the case C-670/15 Jan Šaplachta (request for a preliminary ruling by the Federal Labour Court of Germany), which concerns a cross-border dispute involving the question whether the Member State of the court sitting or the Member State of the applicant's residence must cover the costs incurred for the translation of the declaration and supporting documents annexed to the legal aid application. This case is yet another example demonstrating the complexity of the cross-border issues.

Conclusion

The mentioned examples clearly demonstrate that both Member States and the EU face a difficult task of balancing the need for efficient criminal justice system and respect of

fundamental rights. Our success or failure would directly depend on the efficiency of cooperation between national competent authorities of the given Member States, between Member States, as well as between Member States and the EU. This is easier to be said than to be done.

Paraphrasing an old joke, I would say that the deeper one goes into the deep forest, the more guerrilla fighters he meets.

I would therefore only encourage you as representatives of national authorities to have the courage and actively use the opportunity to address questions to the CJEU. The court is bound to pronounce on cases before it. Therefore, requests for preliminary rulings addressed to the CJEU is a necessary precondition for ensuring progressive interpretation of EU law and efficiency of EU criminal justice system.