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Magdalena Ličková, Legal Secretary, Chambers of Advocate General Emiliou, Court of Justice of the EU, Luxembourg, 2026

Case Scenario 2

Facts

[Imaginary] Mr Novy was prosecuted in the Member State A for several offences allegedly committed in 1995. In 1998, the president of that State issued an amnesty that covered those offences. Later, in 2001, the competent national court terminated the prosecution based on that amnesty. That decision became final, and was endowed, under national law, with the same effects as an acquittal. However, in application of the respective national law, the amnesty was revoked in 2017. The revocation of that amnesty meant that the initial criminal prosecution resumed. Mr Novy contested, before the competent national court, the lawfulness of the decision to resume those criminal proceedings. After filing that petition, he went into hiding.

- a) The competent national court of the Member State A observes that Mr Novy's whereabouts are currently unknown. It is unclear whether he is currently within the territory of the Union or has perhaps travelled to Australia. Be it as it may, that court does not exclude issuing a European arrest warrant ('EAW'). It is nevertheless not certain whether, conducting the criminal prosecution against Mr Novy would not be precluded by the principle of *ne bis in idem* as enshrined in the national Constitution.

The competent national court is therefore considering referring a question for a preliminary ruling and it wishes to ask the Court to submit the question referred to the urgent preliminary proceedings.

Questions to be considered:

- Is the Charter applicable? Is any aspect EU law concerned (and therefore does the Court have jurisdiction to reply? [NB: No EAW has been issued yet.]
- Do you think that the request for the preliminary ruling will be admissible given that Mr Novy's whereabouts seem unknown and given that the national court is doubting the compatibility of issuing an EAW with a rule enshrined in the national constitution?
- Do you think that the request for the case to be submitted to the urgent preliminary proceedings can succeed?

- b) The competent national court of the Member State A decided to issue an EAW. Meanwhile, it appeared that Mr Novy travelled to the Member State B. There he was placed into custody based on the EAW. However, the Italian competent executing authority is not certain whether it may execute that EAW given that is not sure whether surrendering Mr Novy to the Member State A would not lead to the principle of *ne bis in idem* being infringed.

It is therefore considering referring a question for a preliminary ruling to the Court of Justice. It wishes to ask the Court to submit the question referred to the urgent preliminary proceedings.

Questions to be considered:

- Can the court of the Member State B ask a preliminary question about the compatibility with EU law of the national law of the Member State A? Is such a question admissible?
- Do you think that the request for the case to be submitted to the urgent preliminary proceedings can succeed?
- Also, imagine that this case is to be determined with an Opinion of the Advocate General. The Opinion is published. The Government of the member State A does not agree with this. Can that government submit observations expressing their disagreement?

Legal Framework

Council Framework Decision 2002/584/JHA of 13 June 2002 on **the European arrest warrant and the surrender procedures between Member States** [‘EAW FD’]

Article 1: Definition of the European arrest warrant and obligation to execute it

‘1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.’

Article 3 ‘Grounds for mandatory non-execution of the European arrest warrant’

‘The judicial authority of the Member State of execution (hereinafter "executing judicial authority") shall refuse to execute the European arrest warrant in the following cases:

1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of 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 State;

[...].’

Article 17 of EAW FD, headed ‘Time limits and procedures for the decision to execute the European arrest warrant’, provides in paragraph 1: ‘A European arrest warrant shall be dealt with and executed as a matter of urgency.’