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NAČELO NE BIS IN IDEM U KONTEKSTU EVROPSKOG NALOGA ZA HAPŠENJE: POGLED KROZ JURISPRUDENCIJU SUDA PRAVDE EU

REZIME: U radu se analiziraju najznačajniji stavovi Suda pravde Evropske unije po pitanju interpretacije odredbi Okvirne odluke o Evropskom nalogu za hapšenje kojima je načelo ne bis in idem utvrđeno kao osnova obavezujućeg, ali i fakultativnog izuzetka od postupanja države izvršenja po zaprimljenom ekstradicionom zahtevu. Iako Evropski nalog za hapšenje predstavlja jedan od najznačajnijih instituta krivično-pravne saradnje država članica, odredbe Okvirne odluke kojom je on etabliran u pravu Unije nedovoljno precizno definišu neke od ključnih aspekata njegove primene, što ostavlja dovoljno prostora za različita tumačenja i postupanja nacionalnih organa, čime se doprinosi pravnoj nesigurnosti i nejednakoj primeni prava evropske organizacije u njenim članicama. Sud pravde je neke od ključnih stavova u ovom kontekstu izneo u slučajevima Mantello iz 2010, odnosno AY iz 2018. godine, a u fokusu su primarno bila pitanja vezana za kategoriju "istog dela", kao jednog od ključnih kriterija za primenu ne bis in idem u transnacionalnom kontekstu. Pri razmatranju navedenih slučajeva, korištene su induktivno-deduktivna i metoda analize sadržaja.

KLJUČNE REČI: krivičnopravna saradnja, Evropski nalog za hapšenje, ne bis in idem, Sud pravde Evropske unije, Mantello, AY

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1. Uvod

Evropski nalog za hapšenje (*European Arrest Warrant*, EAW) predstavlja jedan od najznačajnijih, ali i najosetljivijih instituta krivičnopravne saradnje članica Evropske unije. Okvirna odluka 2002/584/JHA², kojom je ovaj institut etabliran u pravnom sistemu organizacije, od njenog donošenja, a posebno nakon izmena i dopuna 2009. godine³, omogućila je procesno rasterećenje ekstradicije vlastitih državljana koji se dovode u vezu sa krivičnim postupkom u drugoj članici, primarno zahvaljujući značajnoj redukciji principa dvostruke kriminalizacije⁴ koji je u ranijim aktima bio veoma zastupljen. Sud države izvršenja nadležan je da utvrdi da li su svi procesni kriteriji za postupanje ispunjeni, ne ulazeći u meritum slučaja koji se vodi ili je okončan pred sudom druge članice, čime je pravosudna saradnja na osnovu Evropskog naloga za hapšenje učinjena fleksibilnijom i automatizovanijom. Međutim, to ne znači da primena Okvirne odluke u državama članicama nije nailazila na ustavnopravne, ali i političke prepreke, posebno kada je reč o ekstradiciji vlastitih državljana. Ustavni sudovi SR Nemačke, Poljske, Kipra i Češke, na primer, uslovljavali su ostvarivanje saradnje po ovom osnovu obezbeđenjem zaštite ljudskih prava lica koja su predmet naloga minimalno na način kako to predviđa njihov vlastiti ustavni akt, dok su se neke druge države, poput Velike Britanije, Malte, Portugala ili Danske, više oslanjale na političke razloge pri osporavanju zahteva za ekstradicijom vlastitih državljana (Tučić, 2020, str. 219). Ovi, ali i drugi problemi zahtevali su snažnije uključivanje Suda pravde Evropske unije u interpretativno otklanjanje nedoumica u primeni Okvirne odluke, čime bi se ne samo doprinelo višem stepenu usklađenosti nacionalnih

² 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.

³ Council Framework Decion 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.

⁴ Princip dvostruke kriminalizacije podrazumeva da je delo koje se određenom licu stavlja na teret kao takvo definisano i odredbama nacionalnog prava države državljanstva i odredbama države koja zahteva ekstradiciju.

provedbenih propisa već i jačanju principa pravne sigurnosti na prostoru Unije. Uzimajući u obzir da je u osnovi Evropskog naloga za hapšenje institut međunarodne pravosudne saradnje, oličen u priznanju i izvršenju stranih sudskih odluka, posebno interesantno pitanje odnosilo se na primenu načela *ne bis in idem* kao razloga za nepostupanje nacionalnog suda po ekstradicionom zahtevu druge članice, o čemu je Sud pravde relevantna zapažanja izneo u dva navrata, prvo u slučaju *Mantello* (C – 261/09) iz 2010, a potom i slučaju *AY* (C – 268/17) iz 2018. godine.

2. Načelo *ne bis in idem* u Okvirnoj odluci o Evropskom nalogu za hapšenje

Sa korenima u rimskom civilnom pravu, načelo *ne bis in idem* manifestuje se kao jedan od postulata pravne sigurnosti i pravičnosti u krivičnopravnoj materiji, te podrazumeva da određeno lice ne može biti dva puta procesuirano, odnosno presuđeno za isto krivično delo. Ono je članom 3. Okvirne odluke o EAW predviđeno kao jedna od mandatornih osnova za nepostupanje suda po ekstradicionom zahtevu druge članice. Ili, kako kaže član 3.2 Okvirne odluke, nacionalni sud će odbiti ekstradicioni zahtev ukoliko raspolaže saznanjima da je „lice u pitanju konačno presuđeno u nekoj državi članici za isto krivično delo, pod uslovom da je, u slučaju izricanja presude, kazna izdržana ili se trenutno izdržava ili se više ne može izvršiti prema pravu države čiji je sud krivičnu sankciju izrekao“⁵. Pored rešenja iz navedenog člana, *ne bis in idem*, kao osnova za odbijanje ekstradicionog zahteva, može se identifikovati i u članu 4.2 i 4.3 Okvirne odluke, ovaj put kao neobavezujuća, diskreciona osnova postupajućeg nacionalnog suda. Članom 4.2 Okvirne odluke ostavljena je mogućnost sudu da ne postupi po ekstradicionom zahtevu ukoliko se predmetno lice već nalazi u krivičnom postupku za isto delo

⁵ Iako se upotrebljava različita terminologija, u suštini identično određenje sa državao je i član 54 Konvencije o primeni Sporazuma iz Šengena. Pogledati: Convention on Implementing the Schengen Agreement of 14 June 1956 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.

pred sudom države izvršenja, odnosno, prema članu 4.3, ukoliko sud države izvršenja odluči da ne procesuirá, odnosno da okonča tekući krivični postupak protiv predmetnog lica za delo na koje se nalog odnosi ili ukoliko je takva odluka suda doneta na zahtev samog lica u postupku, sprečavajući dalje krivične postupke za isto delo (Materljan, I. & Materljan, G., 2019, str. 64). Nedovoljno precizno formulisane, navedene odredbe ostavljale su dosta prostora za različita tumačenja i, posledično, različita postupanja nacionalnih sudova, čime se direktno ugrožavaju principi pravne sigurnosti i pravičnosti na nivou Evropske unije. Samim tim, bilo je samo pitanje vremena kada će se njihovo tumačenje zatražiti od Suda pravde u okviru postupka o prethodnom pitanju.

3. Slučaj *Mantello*

Italijanski sud u Kataniji uputio je Višem pokrajinskom sudu u Štutgartu Evropski nalog za hapšenje na ime gospodina Mantele koji se odnosio na dva krivična dela: dvogodišnje sudelovanje u nelegalnoj trgovini narkoticima u okviru organizovane kriminalne organizacije, te nezakonito nabavljanje, posedovanje, transport, prodaju ili stavljanje narkotika na raspolaganje trećim licima, u isto vreme i na istim mestima na kojima je počinjeno i prvo krivično delo. Nemački sud se u okviru postupka o prethodnom pitanju obratio Sudu pravde Evropske unije sa dva pitanja. Prvo se odnosilo na formulaciju „isto delo“ (eng. *same act*) iz člana 3.2 Okvirne odluke, odnosno da li se pojam „istog dela“ utvrđuje na osnovu nacionalnog prava države koja je ekstradicioni zahtev izdala, prava postupajuće države ili pak na osnovu autonomno protumačenog prava Evropske unije. Očekivano, polazeći od teleološkog principa obezbeđenja jedinstvene primene prava Unije u svim članicama, Sud pravde je oduzeo pravo nacionalnim sudovima da u svetlu domaćeg prava vrše tumačenje pojma „isto delo“ u transnacionalnom ili prekograničnom kontekstu, istakavši da, kako je reč o autonomnoj kategoriji prava Evropske unije, samo je on ovlašćen da vrši njegovo tumačenje. Takođe, kako član 54 Konvencije o primeni Sporazuma iz Shengena i član 3.2 Okvirne odluke imaju identičan cilj, Sud je istakao

da se njegova ranija tumačenja i stavovi u vezi sa članom 54 Konvencije⁶ odnose i na član 3.2 Okvirne odluke. Drugo pitanje je podrazumevalo da li se radnje nelegalnog uvoza narkotika mogu tretirati kao „ista dela“ iz člana 3.2 Okvirne odluke kao i članstvo u organizovanoj kriminalnoj grupi čija je osnovna delatnost upravo nelegalna trgovina narkoticima, posebno ukoliko su, kako se ispostavilo, italijanski istražni organi, u momentu donošenja presude za nezakonit uvoz narkotika, raspolagali dokazima da je gospodin Mantela pripadao organizovanoj kriminalnoj organizaciji, ali su ih, iz istražnih i operativno-taktičkih razloga, odlučili ne izneti pred sud i ne pokrenuti postupak i po tom osnovu. Ovo pitanje je Sud pravde shvatio kao pitanje postojanja pravosnažno presuđene stvari kao bitnog kriterija za primenu *ne bis in idem*, s obzirom da su italijanski istražni organi u konkretnom slučaju raspolagali dokaznim materijalom za dela obuhvaćena Evropskim nalogom za hapšenje (*para.* 43–44). Sud pravde je istakao da se pitanje postojanja pravosnažno presuđene stvari za potrebe člana 3.2 Okvirne odluke utvrđuje na osnovu nacionalnih propisa države čiji je sud presudu doneo, te da sudska odluka koja ne sprečava dalji krivični progon u nacionalnom pravnom kontekstu ne bi trebalo da predstavlja prepreku ni za otpočinjanje niti za nastavak postupka za iste krivične radnje u drugoj članici (*para.* 46–47). Posebno što se, u konkretnom slučaju, italijanski sud, na traženje nemačkog suda u skladu sa članom 15.4 Okvirne odluke, već izjasnio da njegove prethodne odluke ne obuhvataju sve krivične radnje iz Evropskog naloga za hapšenje te, samim tim, nemački sud nema osnovu za primenu načela *ne bis in idem* i odbijanje ekstradicionog zahteva (*para.* 50–51). Šta navedeni stavovi Suda pravde zapravo znače? Kada je o prvom segmentu reč, uzimajući u obzir i dalje izražene razlike u krivičnom pravu država članica, uključujući i definicije bića krivičnog dela, Sud pravde je, oduzimajući pravo nacionalnim sudovima da samostalno interpretiraju pojam „istog dela“, omogućio transnacionalnu primenu načela *ne bis in idem*. U kontekstu drugog pitanja, Sud pravde je prepoznao značaj nacionalnih propisa i odluka nacionalnih sudskih organa pri utvrđivanju postojanja pravosnažne presuđene stvari, te uslove za primenu *ne bis in idem* sa nacionalne ravni transferisao na evropsku. Ili, kako kaže Sud, prvo moraju biti ispunjeni uslovi za primenu nacio-

⁶ Pogledati, na primer: ECJ, *Zoran Spasic*, 27. 05. 2014, C – 29/14, PPU.

nalnog *ne bis in idem*, pa tek onda ovo načelo može biti upotrebljeno i u transnacionalnom, evropskom kontekstu (Ivičević-Karas, 2014, str. 291).

4. Slučaj AY

Pored toga što su u njegovom fokusu fakultativni razlozi primene *ne bis in idem* iz člana 4. Okvirne odluke, slučaj AY interesantan je i zbog toga što se Sudu pravde obratio Županijski sud u Zagrebu, pred kojim je vođen postupak protiv dva lica za davanje i primanje mita, jednog ranije visoko rangiranog službenika iz Hrvatske, te predsjednika upravnog odbora jednog mađarskog trgovačkog društva. Županijski sud, posredstvom USKOK-a⁷, uputio je Evropski nalog za hapšenje mađarskoj strani sa zahtevom za ekstradicijom mađarskog državljanina, međutim, mađarski sud je to odbio, ističući kako je po istom krivičnom delu u Mađarskoj već vođena istraga koja je obustavljena, mada je predmetno lice u ovom postupku imalo status svedoka, a ne osumnjičenog (Materljan, 2019, str. 232). Nakon što je mađarska strana odbila da se izjasni po ponovljenom zahtevu, Županijski sud se maja 2017. godine obratio Sudu pravde Evropske unije, tražeći odgovor na ukupno pet pitanja, od kojih su se četiri odnosila na delovanje organa Mađarske kao zemlje izvršenja naloga, a poslednje na postupanje Županijskog suda. Pitanje koje je u našem fokusu odnosilo se na to da li odredbe člana 4.3 Okvirne odluke, kojima se predviđa fakultativna mogućnost odbijanja izručenja iz razloga prethodnog odustajanja ili obustave krivičnog postupka po istom krivičnom delu u zemlji izvršenja, treba tumačiti tako da se one odnose samo na konkretno krivično delo ili obuhvataju i lice na koje se nalog odnosi, posebno uzimajući u obzir da se konkretno lice u istražnom postupku u Mađarskoj pojavilo u svojstvu svedoka, dok se u postupku pred Županijskim sudom ono pojavljuje kao osumnjičeni, odnosno optuženi. Sud pravde je istakao da prethodno odustajanje ili obustava postupka po istom krivičnom delu u kojem se lice iz Evropskog naloga za hapšenje pojavljuje kao svedok ne može predstavljati osnovu iz člana 4.3 Okvirne odluke za nepostupanje po nalogu, ukoliko se

⁷ Ured za suzbijanje korupcije i organizovanog kriminaliteta Republike Hrvatske.

ono u nalogu pojavljuje kao osumnjičeni. Po mišljenju Suda, ukoliko bi se odredbe člana 4.3 Okvirne odluke tumačile samo u kontekstu krivičnog dela, a ne i u kontekstu identiteta i svojstva lica na koje se nalog odnosi, stvorio bi se prostor za izbegavanje postupanja po ovom važnom krivičnopravnom institutu Evropske unije. Takođe, kako su mogućnosti nepostupanja iz člana 4.3 Okvirne odluke fakultativnog karaktera, one predstavljaju izuzetak i moraju se tumačiti restriktivno (*para.* 52–57). Istražni postupak koji je obustavljen pred mađarskim organima, vođen je protiv n.n. lica, a ne protiv konkretnog mađarskog državljanina, te se ovakav *in rem* postupak ne može koristiti kao osnova za nepostupanje po ekstradicionom zahtevu koji je uputila hrvatska strana. Sud se osvrnuo i na činjenicu da su se mađarski organi „oglušili“ o ponovljeni Evropski nalog za hapšenje, istakavši da je nadležno telo dužno doneti odluku o svakom Evropskom nalogu za hapšenje koji mu je upućen, čak i ukoliko je u toj državi prethodno već odlučivano o ranijim nalozima za hapšenje koji su se odnosili na isto lice i isto krivično delo, a drugi je Evropski nalog za hapšenje izdat iz razloga što je u državi izdavanja podignuta optužnica protiv lica na koje se nalog odnosi (*para.* 32–36). Dakle, bez obzira što su se mađarski organi već jednom negativno izjasnili o ekstradicionom zahtevu Hrvatske, oni su bili dužni da se izjasne i po novom nalogu, iz prostog razloga što je došlo do promene procesnog statusa lica A.Y., te je od osumnjičenog, nakon podizanja optužnice, postalo lice optuženo za izvršenje krivičnog dela davanja mita.

5. Zaključak

Evropski nalog za hapšenje predstavlja jedan od ključnih instituta krivičnopravne saradnje članica Evropske unije. I pored napretka koji je ostvaren u nepune dve decenije, primena ovog instituta i dalje nailazi na različite prepreke, koje posebno dolaze do izražaja po pitanju ekstradicije vlastitih državljana u vezi sa izvršenjem krivičnog dela u drugoj članici. Države članice neretko pribegavaju različitim mehanizmima kako bi postupak ekstradicije izbegle, uključujući i mogućnosti predviđene članovima 3 i 4 Okvirne odluke, a među kojima posebno do izražaja dolazi načelo *ne bis in idem* u transnacionalnom kontekstu.

U okolnostima nedovoljne preciznosti odredbi kojima je regulisana primena ovog načela kao svojevrsne zaštite prava lica koje se dovodi u vezu sa prekograničnim krivičnim delom, pojavila se potreba njihovog interpretativnog „preciziranja“ od strane Suda pravde Evropske unije. Za sada, Sud pravde se kroz dva slučaja bavio pitanjem uslova prekogranične primene načela *ne bis in idem* u skladu sa referentnim odredbama Okvirne odluke, u slučaju Mantello iz 2010, te u slučaju AY iz 2018. godine.

Značaj slučaja *Mantello* je u tome što je Sud pravde samo značenje jednog od ključnih uslova prekogranične primene načela *ne bis in idem*, a to je postojanje „istog dela“ ili „istih radnji“ iz člana 3.2 Okvirne odluke, izuzeo iz nadležnosti nacionalnog prava te, kako je reč o autonomnoj kategoriji prava Evropske unije, sebe verifikovao kao isključiv interpretativni autoritet u tom kontekstu. Na ovaj način Sud je, uvažavajući razlike u krivičnopravnoj materiji u državama članicama, uključujući i definicije pojedinih elemenata bića krivičnih dela, omogućio primenu načela *ne bis in idem* na evropskoj ravni, jer bi, u suprotnom, njegova primena bila veoma upitna. Ujedno, Sud je u slučaju *Mantello* jasno ukazao da nacionalni sudovi ne smeju praviti procesne diferencijacije u primeni *ne bis in idem* u domaćem i prekograničnom kontekstu te, ukoliko su ispunjeni uslovi za njegovu primenu u domaćem smislu, ispunjeni su uslovi za primenu i u evropskom smislu. I ne samo to, ispunjenost uslova za primenu *ne bis in idem* na nacionalnoj ravni, po Sudu pravde, manifestuje se kao svojevrsan „filter“ za njegovu primenu na transnacionalnoj ravni.

Slučaj *AY* značajan je jer je Sud u okviru njega precizirao status odredbi člana 4.3 Okvirne odluke kojima je regulisana fakultativna mogućnost odbijanja postupanja po Evropskom nalogu za hapšenje. Sud pravde je utvrdio da, u skladu sa njihovom fakultativnom prirodom, predmetne odredbe treba tumačiti što striktnije, jer bi u suprotnom bila ozbiljno dovedena u pitanje zajednička borba protiv prekograničnog kriminala. Takođe, Sud je u ovom slučaju precizirao da se fakultativni *ne bis in idem* iz člana 4.3 Okvirne odluke ne odnosi samo na krivično delo iz Evropskog naloga, već primarno na status lica u krivičnom postupku. Tako, ukoliko se u postupku pred organima države izvršenja lice pojavljivalo u svojstvu svedoka, osnova za aktivaciju *ne bis in idem* i odbijanje

Evropskog naloga za hapšenje u svetlu člana 4.3 Okvirne odluke ne postoji ukoliko se dato lice u nalogu tretira kao osumnjičeni ili optuženi. Dodatno, u slučaju ponovnog upućivanja Evropskog naloga, promena statusa lica u krivičnom postupku predstavlja dovoljnu novu činjenicu koja zahteva izjašnjenje i po ponovljenom ekstradicionom zahtevu. Time Sud pravde „tera“ države članice na intenzivniju saradnju na osnovu Evropskog naloga za hapšenje i praćenje izmena svih relevantnih pravnih činjenica, pa makar i statusnog karaktera, pri realizaciji prekogranične ili transnacionalne saradnje.

Koliko god predstavljali ozbiljne korake, navedeni slučajevi su tek prvi jurisprudencijalni koraci postepene kristalizacije relevantnih odredbi Okvirne odluke o Evropskom nalogu za hapšenje, uključujući i primenu načela *ne bis in idem*. Uzimajući u obzir da je primena *ne bis in idem* daleko kompleksnija u prekograničnom nego u unutrašnjem pravnom kontekstu, ali i vodeći računa o značaju policijske i pravosudne saradnje u krivičnim stvarima u Uniji, za očekivati je veći aktivizam Suda pravde kako bi se, uklanjanjem eventualnih neodumica, zajednička borba protiv prekograničnog kriminala učinila efikasnijom.

Literatura i izvori

- Convention on Implementing the Schengen Agreement of 14 June 1956 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.* EU OJ L 239, 22. 9. 2000, p. 16–62.
- Court of the Justice of the European Union. Case 261/09, *Gaetano Mantello*. Judgement of the Court (Grand Chamber) of 16 November 2010. Reports of the Cases, I-11477.
- Court of the Justice of the European Union. Case 129/14 PPU, *Zoran Spasic*. Judgment of the Court (Grand Chamber) of 27 May 2014. Electronic reports of cases, Court reports general.
- Court of the Justice of the European Union. Case 268/17, *AY (Mandat d'arret – Temoin)*. Judgment of the Court (Fifth Chamber) of 25 July 2018. Electronic reports of the cases, Court reports general.
- Eurojust. 2020. *Case Law by the Court of Justice of the European Union on the European Arrest Warrant*. The Hague: Eurojust.
- Ivičević-Karas, E. 2014. Načelo *ne bis in idem* u europskom kaznenom pravu. *Hrvatski ljetopis za kaznene znanosti i praksu*, 21(2): 271–294. Zagreb, Republika Hrvatska.
- Materljan, I. i Materljan, G. 2019. Europski uhidbeni nalog za napredne korisnike: odluka o neizvršenju naloga zbog obustave istrage *in rem* (načelo *ne bis in idem*) i ispitivanje njezine zakonitosti. *Hrvatski ljetopis za kaznene znanosti i praksu*, 26(1): 59–90. Zagreb, Republika Hrvatska.
- Materljan, I. 2019. Hrvatski predmeti na sudovima Europske unije. *Godišnjak Akademije pravnih znanosti Hrvatske*, 9(1): 211–271. Zagreb, Republika Hrvatska.
- Sud Europske unije – odbijanje europskog uhidbenog naloga*. 2021. Preuzeto 28. 01. 2021 sa URL: <https://www.iusinfo.hr/aktualno/u-sredistu/34919>.
- Tučić, B. 2020. *Osnovi politike integracije i saradnje u oblasti unutrašnjih poslova i pravosuđa u Evropskoj uniji: Pravni i institucionalni okvir „Prostora slobode, bezbjednosti i pravde“*. Banja Luka: Fakultet bezbjednosnih nauka Univerziteta u Banjoj Luci.

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***NE BIS IN IDEM* AND THE EUROPEAN ARREST WARRANT:
VIEW THROUGH THE JURISPRUDENCE OF THE EU COURT
OF JUSTICE**

SUMMARY: Subject of the paper are the most important positions of the EU Court of Justice in regard of the use of *ne bis in idem* legal principle as an obligatory, as well as facultative basis for the rejection of European Arrest Warrant (EAW) issued by competent authorities of other member state. In this regard, focus of the analysis is on two main cases, Mantello from 2010 and AY from 2018, in which the Court of Justice made very important first steps in order to secure an equal interpretation and the implementation of the articles 3.2 and 4.3 of EAW Framework decision, i.e. the category of the „same act“ as a precondition for the activation of *ne bis in idem* principle within crossborder or transnational context. Among other things, in the Mantello case the Court of Justice clearly underlined that the category of the same act, being an autonomous EU legal entity, stemming from articles 3.2. and 4.3. of the EAW Framework decision, can not be individually interpreted by the national courts of the member states. Its efforts in the AY case were directed to the reduction of the use of *ne bis in idem* principle in facultative manner, making point that previous *in rem* legal actions do not represent a trigger for the activation of *ne bis in idem* and the rejection of European Arrest Warrant from other member state.

KEY WORDS: *ne bis in idem*, Court of Justice of the European Union, European Arrest Warrant, Framework decision, preliminary procedure, Mantello, AY.

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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.

List of references and sources

- Convention on Implementing the Schengen Agreement of 14 June 1956 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. EU OJ L 239, 22.9.2000, p. 16 – 62.
- Court of the Justice of the European Union. Case 261/09, Gaetano Mantello. Judgement of the Court (Grand Chamber) of 16 November 2010. Reports of the Cases, I-11477.
- Court of the Justice of the European Union. Case 129/14 PPU, Zoran Spasic. Judgment of the Court (Grand Chamber) of 27 May 2014. Electronic reports of cases, Court reports general.
- Court of the Justice of the European Union. Case 268/17, AY (Mandat d'arret – Temoin). Judgment of the Court (Fifth Chamber) of 25 July 2018. Electronic reports of the cases, Court reports general.
- Eurojust. 2020. Case Law by the Court of Justice of the European Union on the European Arrest Warrant. The Hague: Eurojust.
- Ivičević-Karas, E. 2014. Načelo ne bis in idem u europskom kaznenom pravu. Hrvatski ljetopis za kaznene znanosti i praksu, 21(2): 271-294. Zagreb, Republika Hrvatska.
- Materljan, I. i Materljan, G. 2019. Europski uhidbeni nalog za napredne korisnike: odluka o neizvršenju naloga zbog obustave istrage in rem (načelo ne bis in idem) i ispitivanje njezine zakonitosti. Hrvatski ljetopis za kaznene znanosti i praksu, 26(1): 59 – 90. Zagreb, Republika Hrvatska.
- Materljan, I. 2019. Hrvatski predmeti na sudovima Europske unije. Godišnjak Akademije pravnih znanosti Hrvatske, 9(1): 211 – 271. Zagreb, Republika Hrvatska.
- Sud Europske unije - odbijanje europskog uhidbenog naloga. 2021. Preuzeto 28.01.2021, sa URL: <https://www.iusinfo.hr/aktualno/u-sredistu/34919>.
- Tučić, B. 2020. Osnovi politike integracije i saradnje u oblasti unutrašnjih poslova i pravosuđa u Evropskoj uniji: Pravni i institucionalni okvir „Prostora slobode, bezbjednosti i pravde“. Banja Luka: Fakultet bezbjednosnih nauka Univerziteta u Banjoj Luci.