

DEFENCE MEMORY
before the investigating division of the Rennes Court (hearing of 24/10/2019)
After additional information, for the purpose of refusing to execute 2 European arrest warrants

Abbreviated version based on the 29-page original written on 22/10/2019

Following a request for additional information and documents obtained on 09/10/2019, the Court must exercise its control, which requires a formal and substantial dual analysis as to whether the procedure has been complied with and whether the effective legal conditions for the execution of EAWs submitted to it exist, in accordance with the following principles:

- Compliance with the prescribed formalities under penalty of nullity and irreparable prejudice to the rights of the defence during the appearance phase before the Prosecutor General, prior to appearance before the Chamber of Investigation.

The European arrest warrants were not validly notified by the Prosecutor General's Office, which in each case notified a warrant of "26 July 2012" when in reality the EAWs were issued on 6 June 2016. The date of 26 July 2012 is in reality that of an Italian national arrest warrant, and not a European arrest warrant (> violation of the prescribed formalities on pain of invalidity_ article 695-27_ infringing the right of defence)

Mr. VECCHI indicated that in case of surrender he would choose as lawyer Mr. Giuseppe PELAZZA of the Milan Bar Association. However, there is no record in the proceedings of the transmission of this request, as this omission necessarily infringes the rights of the defence (article 695-27)

- The misappropriation of procedures and the non-compliance of European arrest warrants.

THE REMINDER OF LEGAL PRINCIPLES for EAWs:

- The European Arrest Warrant is a judicial decision explained in a form set out in an annex to the Framework Decision on the European Arrest Warrant adopted by the Council of the European Union on 13 June 2002.

- This form is not an inconsequential formality, since it is for the authorities of the issuing State to provide rigorous and fair information on the information required by the executing State.

- Therefore, the judicial authority issuing a European arrest warrant in order to obtain the execution of a custodial sentence or detention order shall undertake to make known without inaccuracy the measures for which it is requesting execution.

- Issuing judicial authorities must ensure the existence of a legally enforceable national judicial decision before issuing a European arrest warrant.

- The enforcement judicial authorities will have to ensure that the sentences on which the EAW is based are enforceable.

For the EAW relating to the enforcement of the sentence imposed on 12 November 2007 by the Milan Court of Appeal

> As confirmed by the additional information provided by the Italian judicial authority, the sentence was declared extinguished by a measure of the MILAN Court of Application of Penalties on 25 March 2010. Similarly, the Prosecutor General's Office of the Italian Republic states by note of 4 October 2019 that the sentence imposed on

Mr VECCHI has been fully served. It cannot therefore be accepted that this fully executed sentence could validly be the subject of a European arrest warrant on the grounds that the decision of the Court of Appeal of Milan was taken into account for the final calculation of the sentence still to be served by confusing the two sentences handed down by the Court of Appeal of Genoa, the Court of Appeal of Milan... The investigating chamber at the Rennes Court of Appeal was therefore seized on the basis of a sentence that no longer exists. The European arrest warrant was issued on 6 June 2016, which means that at the time of its issuance, the Italian judicial authority was aware that the sentence attached to the judgment of the MILAN Court of Appeal had expired.

This situation is all the more serious as it has allowed the Public Prosecutor's Office and the Court to assume, prior to the execution of the additional information, that an overall sentence of 16 years and half had to be executed.

For the EAW relating to the enforcement of the sentence imposed on 9 October 2009 by the Court of Appeal of Genoa

> On the impossibility of applying the European arrest warrant procedure instead of the extradition procedure for acts committed in Italy before 7 April 2002.

A very strong ambiguity exists and a question on this subject is justified insofar as when the Framework Decision was transposed into Italian law, the Italian law of 22 April 2015 published on 29 April 2005, in article 40 ("transitional provisions"), stated that the law was applicable to requests for the execution of European arrest warrants issued and received after the date of its entry into force. In Italy, therefore, the hypothesis would remain that the declaration made under Article 32, included in the law, would prohibit the issue by the Italian authorities of a European arrest warrant for acts committed before 2002.

In support of this hypothesis, the Defence argues that Italy should therefore have resorted to the extradition procedure.

- The enforceability of the decisions covered by the arrest warrants without the possibility of subsequent substitution, even in the context of additional information.

> The arrest warrant issued is for a non-binding decision in so far as it is based on the decision rendered by the Court of Appeal of Genoa partially annulled by the Supreme Court of cassation. The Court will find that the EAW relating to the situation in Genoa is not in conformity in that it does not contain with certainty the indication of the enforcement order on which it is based, in breach of the mandatory provisions of the European Framework Decision and Article 695-13 of the Code of Criminal Procedure. And that it does not satisfy the requirement of relative regularity to the certain indication, neither the enforceable decision on which it is based nor the sentence imposed and still to be enforced.

- Respect for the principle of personal appearance during the proceedings conducted in the requesting State.

In the European arrest warrant form of 6 June 2016, the applicant authority ticked the box indicating that Mr VECCHI "did not appear in person at the trial leading to the decision. " The additional information confirmed that Mr. VECCHI was not present in person at the trial before the Court of Appeal of Genoa, which resulted in the conviction judgment of 9 October 2009.

It is mentioned in the body of this judgment that Mr. VECCHI was "failing". It is also established that Mr. VECCHI was not present in person at the hearing before the Supreme Court of Cassation.

> Insofar as Mr. VECCHI was absent during the trial leading to the decision establishing the EAW, and that it is not established that he is in one of the cases of exclusion provided for by the Framework Decision and the Code of Criminal Procedure, the Chamber of Investigation can only refuse his surrender.

- Compliance with the rule of dual criminality, with the exception of the 32 offences of the D-C of 13 June 2002, as set out in article 695-23 of the Code of Criminal Procedure, the scope of which is a matter of public policy.

> The assessment of dual criminality must imperatively be made in relation to the state of positive law on the day of the facts, and not in the light of French legislative developments to date.

> The Court is asked to refuse to hand over Mr VECCH, as the Court of Appeal in Athens, Greece, decided in 2016 for a similar situation. In the alternative, the Court could decide to refuse to surrender for enforcement of the sentence specifically imposed for the offence of "devastation and looting", i.e. 10 years' imprisonment in this case.

In particular, the question will arise of the possibility of a surrender when part of the facts are incriminated in both States, but another part of the facts are not. The Investigating Chamber is asked to rule, like the Criminal Chamber, that surrender is prohibited when part of the acts covered by the warrant are not criminalized in France.

- Compliance with the principle of proportionality.

A European arrest warrant must be proportionate to its purpose, taking into account the serious consequences of its execution with regard to restrictions on freedom of movement and residence. The sentence imposed by the Court of Appeal of Genoa and partially upheld by the Supreme Court appears totally disproportionate in view of the facts attributed to Mr VECCHI.

Moreover

In the same context as the one that led to Mr VECCHI's conviction, the European Court of Human Rights sentenced the Italian State for violation of Article 3 of the European Convention on Human Rights, i. e. for the prohibition of torture, inhuman or degrading treatment, on the grounds that

- The proven ill-treatment of demonstrators by Italian police officers, with no specific instructions on the use of force and no instructions given to officers on this point.

- Assaults by police officers on demonstrators in a general context of excessive, indiscriminate and manifestly disproportionate use of force, with uncontrolled use of violence by police, with officers systematically beating people, including those lying on the ground or sitting with their hands in the air, although they have not committed any act of violence or resistance against the police.

- The seriousness of the facts described by the applicants and confirmed by the national courts, with each applicant being beaten violently, most of them being beaten with clubs, kicked and punched and, in some cases, furniture being thrown at them. The blows received caused bruises, injuries and, in some cases, serious fractures leaving permanent physical damage.

- "The systematic and coordinated nature of the police violence and the attempts to justify it a posteriori were, in the eyes of the Court of Appeal, indicative of conscious and concerted behaviour rather than a state of stress and fatigue" (cons.73).

- The European Court of Human Rights having noted the inadequacy of the Italian legal system for the repression of torture

Further MORE:

The Court will agree with the Defence that there can be no proportionality in this case, insofar as:

- The offence of "devastation" establishes collective liability, which does not exist in French law, which provides exclusively for individual liability.

- This criminal offence attributed to Mr VECCHI, in addition to the fact that it does not exist under French law, could only have been analysed under correctional qualifications, and therefore could not be punishable by penalties exceeding 10 years.

- Under these conditions, Mr VECCHI would be the subject of a procedure reserved for defendants for the most serious acts, whereas the similar procedure in France would not have been applied to him.

The Court would therefore be asked to consider that the execution of the European arrest warrant, under these conditions, would violate for all these reasons the fundamental principles of proportionality and fair trial.

> It should be noted that such a solution was adopted in 2016 by the Athens Court of Appeal, which had before it an EAW issued by Italy in a context similar to that of the case.

- The absence of any risk of inhuman and degrading treatment.

In view of the existence of endemic prison overcrowding, it is for the Court to carry out an individual examination which requires that the Italian authorities be requested to provide information concerning the exact conditions of detention in the prison in which Mr VECCHI would be held, including on a temporary or transitional basis.

The Court cannot, as things stand at present, check whether the material conditions of Mr VECCHI's detention, once handed over to the Italian authorities, would comply with respect for human dignity and the protection of the health and well-being of the detained person, even though Italy has already been convicted for the conditions it imposes on its detainees.

France cannot execute a European Arrest Warrant which will have the effect of surrendering a person to the authorities of a country which does not comply with the requirements of the European Convention on Human Rights.

- The principle of enforcement of the sentence in the State of execution of the warrant, in accordance with the right to respect for private life

If the Court were to consider that it could grant the request for an arrest warrant for the execution of the sentence imposed by the Court of Appeal of Genoa, Mr VECCHI, who has resided in French territory for more than five years without interruption, would request that his sentence be executed on French territory.

Article 695-24 of the Code of Criminal Procedure provides that the execution of the European arrest warrant may be refused if the person has been lawfully and continuously residing in France for at least 5 years and the conviction decision is enforceable on French territory pursuant to Article 728-31 of the Code of Criminal Procedure.

It is proven by the documents presented by the Defence and by the feasibility investigation which was carried out by decision of the Court of Appeal that, Mr VECCHI, a European citizen, has resided in ROCHEFORT EN TERRE for 8 years, that he has settled there regularly (although invisible to the Italian authorities) and that he has an economic activity and a business partner. It also provides proof of the possibility of employment under a permanent contract.

Imposing Mr. VECCHI to serve the sentence in Italy would cause a new break in his life and social isolation, while his life is now established in France. The condition of habitual residence on the national territory is therefore met.