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## EUROPEAN ARREST WARRANT: SOME QUESTIONS ON LEGAL INTERPRETATION AND APPLICATION

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**Abstract.** *The paper deals with certain aspects of the interpretation and application of the law pertaining to the European Arrest Warrant (EAW), which are related to a person's right to question the possibility of criminal prosecution as well as to the impossibility of execution of criminal prosecution in respect of a person who was not surrendered to the Republic of Lithuania. It is observed that the procedures of the execution of the EAW in legal practice, as distinct from their delineation in the provisions of the legal acts of the European Union, are being inadmissibly misinterpreted in the national law. It conditions infringements of the right of a person to be brought to criminal account to know what he/she is suspected of. A person's right to question the possibility and the limits of criminal prosecution is a constitutional guarantee towards the legitimacy of criminal proceedings.*

**Keywords:** *criminal procedure, European Arrest Warrant (EAW), international cooperation in criminal proceedings, suspect, liability limits.*

## Introduction

The European Arrest Warrant (EAW) is the first and one of the most important instruments in the context of the European criminal justice, which is assigned for the implementation of bilateral acknowledgement of adjudications and pre-trial orders; it is a significant jump from the traditional extradition law towards the Member States' high mutual confidence in their rapid struggle against criminality.<sup>1</sup> Such thoughts expressed by Fichera and Vennemann serve as an introduction to the analysis of one of the forms of international cooperation in criminal proceedings, i.e. of the EAW procedure in the Lithuanian law, which reveals certain aspects causing concern in the context of the human rights protection.

The Lithuanian criminal procedure, the principled provisions of which were formed during the transition period when Lithuania was preparing to join the European Union (EU) and also after its becoming a full-rate member of this community, is being implemented not only on the grounds of the national law but also on the grounds of the international and EU law. It must be accepted that it means nothing else but an ambitious step, which, seeking for justice, is taken equivalently with the necessity to secure the protection of human rights, lawful interests and freedoms in the Lithuanian criminal procedure. This pursuit is concurrently related to urges for international cooperation in criminal proceedings as well; particularly, when the value to be mostly protected, i.e. a person and his/her lawful interests,<sup>2</sup> is put on the justice levers. From the point of view of its nature, this criminal process, according to the author of the present article, is equated to the growth of the legal traditions of the countries of modern Europe, which, according to its assignment, does not lag behind the longevous traditions<sup>3</sup> of the criminal proceedings of Western states. Actually, it must be accepted that this assignment, defined in Article 1 of the Code of Criminal Procedure of the Republic of Lithuania<sup>4</sup> (the CCP), is either a preliminary foreseen goal, which is rarely or even never achieved in the legal reality, or a thorny path paved with the application (implementation) of the corresponding legal provisions that leads to it.

One of the first instruments of international cooperation in criminal proceedings, which was incorporated into the national law after Lithuania has joined the EU and which has been applied since then, is the EAW mechanism consolidated in the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender

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- 1 Fichera, M. The European Arrest Warrant and the sovereign state: a marriage of convenience? *European Law Journal*. 2008, 15(1): 71; Vennemann, N. The European Arrest Warrant and its human rights implications. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. 2003, 63(1): 103.
  - 2 Weiler, J. H. H. *Courts and Compliance in the European Union: The European Arrest Warrant in National Constitutional Courts*. New York: NYU School of Law, 2008.
  - 3 See also: Kazlauskas, M.; Goda, G. Naujo Baudžiamojo proceso kodekso projektas: kūrimo prielaidos, struktūra, naujovės [New Draft Code of Criminal Procedure: Development Preconditions, Structure, Innovations]. *Teisės problemos*. 1999, 3: 6.
  - 4 Code of the Criminal Procedure of the Republic of Lithuania. *Official Gazette*. 2002, No. 37-1341.

procedures between the Member States<sup>5</sup> (Framework Decision). Though this Framework Decision is not considered as an international agreement of the Republic of Lithuania, but, as per the Treaty on joining the European Union, the Republic of Lithuania accepted the international commitments, according to which the superiority of the EU law in settling the items attributed to its competence is secured, as well as the commitment to secure the implementation of the EU legal acts, including the abovementioned Framework Decision (this Framework Decision, *inter alia*, is meant for facilitating and forwarding judicial cooperation<sup>6</sup>). Indeed, as per this legal act, which, according to Jimeno-Bulnes, is a ‘star’ rule on judicial cooperation in criminal matters,<sup>7</sup> Lithuania not only accepts the role of active membership in the community but also simultaneously seeks to secure an effective process of the struggle against criminality. Actually, this aspiration does not get along without certain ‘gestures’ of competent state authorities, what could be called a restriction of a person’s procedural safeguards. That is to say, sometimes, when it is inevitably necessary to apply the EAW procedures, the problem regarding the implementation of the right to question the possibility and the limits of the criminal prosecution of a person for the criminal deeds for which he/she was not surrendered to the applying state (to the state which had issued the EAW), arises. It is caused by the lack of legal clarity and sureness in the regulation of certain aspects, which is consolidated in the CCP, and by the lack of the conformity of the practice of law enforcement institutions’ with the requirements of legal acts.

The purpose of the present scientific paper is to analyze the EAW application procedures in the course of carrying out criminal procedural activities and to answer the following questions: which of the activities create preconditions for the restriction and violation of defence rights; which measures must be taken to avoid such violations; how to improve legal regulation and optimize the practical implementation of legal provisions.

The subject of the research is the provisions of the EU and national law regarding the implementation of the EAW in the struggle against criminality as well as the international and national courts’ case-law on the items under research and the scientific doctrine.

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5 Tarybos 2002 m. birželio 13 d. pagrindų sprendimas 2002/584/TVR dėl Europos arešto orderio perdavimo tarp valstybių narių tvarkos [2002/584/JHA: Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States]. [2002] OL, 19, 6.

6 Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* [2007] OL C 140, 23.06.2007, p. 3. It must be noted that, as regards this particular case, the non-profit organization *Advocaten voor de Wereld* (the plaintiff) submitted the plaint, seeking for total or partial acknowledgement of the Law of Belgium, dated 19 December 2003, on the European arrest warrant, which served as a tool of the implementation of the 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as void. According to the plaintiff, this Framework Decision is illegitimate as the items related to the European arrest warrant had to be regulated by the Convention (Article 34 Part 2 Item d of the Treaty on the European Union), but not by the Framework Decision (Article 34 Part 2 Item b of the Treaty on the European Union).

7 Jimeno-Bulnes, M. European judicial cooperation in criminal matters. *European Law Journal*. 2003, 9(5): 625.

To reach the goal set, the author applies various research methods, including the teleological and systemic methods, the method of documentary analysis, the methods of criticism, abstraction, induction and deduction as well as other methods allowing the evaluation of the criminal procedural activity not only, as philosopher Schopenhauer would say, ‘from the front side of the tapestry, but also from its seamy side, i.e. from the underneath side, on which all binds, raggedness and woven threads are seen’<sup>8</sup>.

## 1. The Problem of the Right to Question the Possibility (Limits) of Criminal Prosecution

The importance of the right to question the possibility and the limits of the criminal prosecution of a person for criminal deeds, if such a person was not surrendered for the said deeds by the foreign state (the state involved in the EAW execution) to Lithuania (the state having issued the EAW), is beyond any doubts. *On one hand*, the realization of the said right provides preconditions for assessing whether the state which applies to another foreign state for an assent to execute criminal prosecution of a person for criminal deeds, if such a person was not surrendered for the said deeds under the EAW, acts according to *actio monopolis* in the execution of the EAW procedures, which evidently violate the principle of honest (fair) realization of a person’s right to defence, his/her right to be informed on the subject of accusation and so on. *On the other hand*, the right under analysis supposes a ‘dialogue’ between the person possibly having committed a criminal deed and state institutions involved in the criminal proceedings activities on the legal status of such a person (on the position and the will to the extent bound with factual and legal substantiation of the suspicion to be formulated for the person), on the birthright of the person to get to know why it is striven to act or had been acted him/her being unaware, i.e. ‘*in absentia*’. Thus, in addition to the content of the values of the said right, its importance is well-grounded by certain obstacles of legal regulation, which restrict the realization of this right. It is particularly evident in the implementation of certain EAW procedures.

To illustrate the ideas presented in this paper, an example of a possible practical situation is provided further on. At first glance, it seems that such a situation causes no discussions: since the year 2005, the Office of the Prosecutor General of the Republic of Lithuania carries out a pre-trial investigation in respect of a citizen A accused for several criminal deeds. After some time, the said person hides away from law enforcement institutions and the court in a foreign state; thus, an international search for the person is initiated and the EAW is issued in Lithuania. When the citizen A is arrested in the foreign state X (where he/she hid), he/she is surrendered to Lithuania on the grounds of the EAW for the specific criminal deeds described in the EAW forms, which meet the provisions of Article 2 Part 2 of the Framework Decision. Then, in Lithuania, in the course of the pre-trial investigation on the deeds serving as the grounds for surrendering

8 Schopenhauer, A. *Gyvenimo išminties aforizmai* [The Aphorisms of the Wisdom of Life]. Vilnius: Tyto Alba, 2007, p. 236.

the citizen A to Lithuania, the new data on *other* criminal deeds, possibly committed by the citizen, which were the subject of the pre-trial investigation earlier are disclosed as well; however, Lithuania did not provide the EAW to the state X for surrendering the citizen A to Lithuania in connection with the other said deeds. In such a situation, the Lithuanian law enforcement institutions carry out a pre-trial investigation on the above-mentioned *other* criminal deeds for a certain period; however, prior to the presentation of the revised (final) suspicions on the said deeds to the citizen A, the Office of the Prosecutor General of the Republic of Lithuania applies to the same state X for an assent to carry out criminal prosecution of the Lithuanian citizen A for the criminal deeds that were not the subject of issuing the EAW from the side of Lithuania and surrendering the citizen A to Lithuania from the side of the state X. This situation seems to be quite clear and the existence of any doubtful aspects related to the right to contest/question the possibility and limits of criminal prosecution for criminal deeds, if such a person was not surrendered to Lithuania for them on the grounds of the EAW, is hardly imaginable. However, certain doubts exist, and they are not few. One of the first of them—the problem of interpretation and application of possible (expectable) criminal prosecution for other criminal deeds or ‘the special rule’, set in Article 27 of the Framework Decision—is disclosed in detail in this part of the paper.

It must be said that, according to Article 27 Part 2 of the Framework Decision, the ‘person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his/her surrender other than that for which he or she was surrendered’, except the cases specified in Article 27 Parts 1 and 3 as well as Article 13 Part 1 of the Framework Decision, where it is pointed out that, if an arrested person assents to the surrender, such an assent and, if required, an expressed waiver of the right for the application of the ‘special rule’ mentioned in Article 27 Part 2 of the Framework Decision, are provided to the executive legal institution according to the internal law of the executing Member State. If a person refuses (Article 13) prosecution for the criminal deeds other than the deeds serving as the grounds for the surrender under the EAW, the Office of the Prosecutor General of the Republic of Lithuania, under Article 27 Part 4 of the Framework Decision, may apply to the foreign state having surrendered the person for an assent to bring the said person to criminal account for the criminal deed committed prior to the one serving as the grounds for the surrender. It is emphasized in references that an assent of the state having surrendered the person to bringing him/her to criminal account for the criminal deed committed prior to the one serving as the grounds for the surrender should serve as the grounds for both *criminal prosecution* of such a person and conviction.<sup>9</sup> Actually, international cooperation of the Member States in criminal proceedings is based on the principle of mutual confidence that, *per se*, predetermines another assessment, namely: the Lithuanian law enforcement institutions have no legal grounds for criminal prosecution of a person for a criminal deed other than the deed serving as the grounds for the surrender committed prior to

9 Čepas, A.; Švedas, G. *Tarptautinė teisinė pagalba baudžiamosiose bylose. Asmenu, įtariamų padarius nusi-kalstamą veiką, išdavimas baudžiamajam persekiojimui* [International Legal Assistance in Criminal Matters. Extradition of Culprits for Criminal Prosecution]. Vilnius: Teisinės informacijos centras, 2008, p. 125.

the one serving as the grounds for the surrender, in spite of the fact that the person is in Lithuania *de facto* and is the subject of the application of a measure of suppression, for example, an arrest. While speaking in images, it may be stated that a person is in the Republic of Lithuania only *de facto* (not *de jure*) until an assent of the foreign state to criminal prosecution of such a person for the criminal deed other than the deed serving as the grounds for the surrender to Lithuania is obtained. Of course, it should be assessed as a legal fiction (presumption) stating that the person is in Lithuania in the physical meaning and simultaneously remains in the foreign state in the legal aspect—because the latter had not surrendered the person for the criminal deeds other than specified in the EAW to the state having issued such an EAW. According to the judgment in the case *Leymann and Pustovarov v. Kihlakunnansyyttäjä*<sup>10</sup> passed by the Court of Justice of the European Community (the CJEC) on 1 December 2008, it is bound with absoluteness of sovereignty of the executing state. Therefore, let us come back to the practical situation provided herein as an example. While analyzing it, the following problem inevitably arises: what are the procedural guarantees of the person being the subject of the foreign state's application for his/her criminal prosecution that precondition the questioning of the actual and legal legitimacy of both the form and contents of such an application (according to Article 27 Part 4 of the Framework Decision)? In other words, whether such a person can contest/express his/her own opinion on the possibility and limits of criminal prosecution for other criminal deeds?

While answering the question, it should be noted that the valid CCP includes no provisions according which the Office of the Prosecutor General of the Republic of Lithuania, while addressing the foreign state for an assent for criminal prosecution of a person for criminal deeds other than the deeds serving as the grounds for his/her surrender, should inform such a person in a certain way. In fact, according to Article 70 Parts 3 and 4 of the CCP, the Office of the Prosecutor General of the Republic of Lithuania applies, if necessary, for an assent, mentioned in Article 70 Part 1 Paragraph 1 of the CCP, to the state having surrendered the person. If a person surrendered by a foreign state under the EAW provides an assent in writing to his/her criminal prosecution for other criminal deeds committed before the surrender under the EAW, the prosecutor guiding the pre-trial investigation submits an application to the judge involved in the pre-trial investigation. The latter, having ascertained that the person willingly assents to prosecution for such criminal deeds and is aware of the consequences of such an assent, passes the decision on the criminal prosecution of the person for the criminal deeds other than the deeds serving as the grounds for the surrender under the EAW. Thus, the law as if mentions that in any case it has to be applied to the person for an assent to his/her prosecution for the criminal deeds other than the deeds serving as the grounds for the surrender; however, this statement does not mean that such a person, in the case of a refusal of prosecution, is generally aware of other details; for example, when the Office of the Prosecutor General of the Republic of Lithuania applies to the relevant foreign state,

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10 Case C-388/08, *Artur Leymann and Aleksei Pustovarov v. Kihlakunnansyyttäjä* [2008] OL C 272, 2008 10 25, p. 13.

what data should be provided to such a state, what the contents and the form of the data are, whether the provisions of the Framework Decision are observed and so on. Such a vacuum of legal regulation predetermines doubts related to the procedural opportunities of a person to contest/express his/her own opinion on the possibility and limits of criminal prosecution for other criminal deeds.

To the best of the author's belief, insufficient legal regulation causes doubts related to the right of the suspect to defence and an appropriate restriction of the criminal process in respect of the suspect, because in such a way the suspect is unconditionally prevented from getting to know (speaking more specifically, to perceive) what he/she is possibly suspected of and to what extent the suspicion is related to the application of the competent institution of the Republic of Lithuania to a foreign state for an assent to criminal prosecution (taking into consideration the conditions of the abovementioned practical situation). It should be stressed that in this context, the contents of the right to know what you are accused of are broader than traditionally. The essence of the said right is as follows: if state institutions inform a person in any form about the intention to carry out a legal 'attack' of criminal character sanctioned by the state in respect of such a person in the future (as provided in Article 70 Parts 3 and 4 of the CCP), they will not be entitled to carry out/continue it later in the absence of an assent of the person to prosecution for the deeds not included in the intention (i.e. in absentia), because otherwise such a process can hardly be considered fair. An application of a competent institution to a foreign state for an assent, as provided in Article 70 Part 3 of the CCP, should be considered a preparatory stage for future criminal prosecution, which presupposes the appearance of the right of answering by legal measures, in other words, by defence. Thus, the said right, in addition to other procedural guarantees, appears at the moment of the appearance of the reasonable opinion on initiating criminal prosecution (continuation of the previously-started pre-trial investigation) of the person. In such a case, the reasonable opinion is presupposed by the actions of state institutions or officers which/who allow supposing that the person is actually suspected of committing the criminal deed. It is predetermined by forecasting the probability of a higher or lower degree of possible suspicion (accusation).<sup>11</sup> The 'gesture' of institutions involved in criminal proceedings activities, according to Part 4 Article 70 of the CCP, allows the suspect to perceive that any procedural measures of criminal prosecution for the criminal deeds other than the deeds serving as the grounds for the surrender to Lithuania under the EAW mean that any later procedural actions should not be executed the person (the party of defence) being in absence to the extent related to the new suspicions. In this regard, it should be agreed to the remark of Trechsel that otherwise the existence of defence *ex hypothesis* (as well as the right of the person to get to know what he/she is accused of) when it is striven to detect strategically important aspects will be precluded.<sup>12</sup> In addition, a unilateral action of state institutions related to an application to a foreign state for an assent to

11 Jurka, R. New insights into the procedure within a reasonable time as a legal principle. *Jurisprudencija*. 2010, 1(119): 313–314.

12 Trechsel, S. *Human Rights in Criminal Proceedings*. Vol. XVII/3. New York: Oxford University Press, 2005, p. 194.

criminal prosecution of the person for the criminal deeds other than the deeds serving as the grounds for the surrender would mean a violation of the principle of immutability, formulated by the European Court of Human Rights (the ECHR) in the cases *Chichlian and Ekindjian v. France* (1989)<sup>13</sup>, *Gea Catalàn v. Spain* (1995)<sup>14</sup>, *Pélissier and Sassi v. France* (1999)<sup>15</sup>, *Dallos v. Hungary* (2001)<sup>16</sup>, *Sadak and others v. Turkey* (2008)<sup>17</sup>, *Sipavičius v. Lithuania* (2002)<sup>18</sup>. According to the said principle, if a person was officially informed (or otherwise made officially aware) on an intention to carry out any actions with the elements of criminal prosecution in respect of him/her, any later actions of such a character should not be carried out in the absence of the person.<sup>19</sup> Such a person (as a suspect *de facto*) or his/her representative should be informed on such actions so as to be provided with an opportunity to respond, i.e. to be heard. In the case *Kamasinski v. Austria* (1989), the ECHR allows understanding that in the criminal procedure, i.e. when criminal prosecution is carried out in respect of the suspect for the criminal deeds serving as the grounds for the surrender of the suspect by another foreign state and it is striven to prosecute the person for other deeds (other than used as the grounds for the surrender of the person under the EAW) by the application of a relevant competent institution to the foreign state for an assent of the latter, the prosecuting institution should duly inform the person on the actions with the elements of criminal prosecution carried out or intended to be carried out in respect of the person (such as application to another foreign state for an assent to initiate/continue criminal proceedings in respect of the relevant deeds), because otherwise the right of the person to be heard is ignored. It is evident that one more goal, i.e. equal procedural opportunities, shows up in this context. Thus, the rules of the game are simple: the relevant attack is followed by an appropriate defence. Legal regulation should ensure a harmonious procedural consonance of these procedural functions. The same principles should be applied to the EAW procedures: prior to addressing another EU Member State for an assent to initiate criminal prosecution of a person surrendered under the EAW for criminal deeds other than the deeds serving as the grounds for the EAW the Office of the Prosecutor General of the Republic of Lithuania is obliged to inform the party of defence, i.e. the suspect and his/her defender, on the intention to apply to the foreign state for an assent as well as on the contents and form of the application. Article 27 Part 2 of the Framework Decision stipulates that an application for an assent provided to the executing legal institution of the foreign state should be supplemented by the information mentioned in Article 8 Part 1, and its translation. Article 8 regulates the contents and the form of the EAW, identifies all the data important for the substantiation of possible criminal prosecution, provides legal

13 Case *Chichlian and Ekindjian v. France*, 29 November 1989, 13 EHRR 553 89/21, A162-B.

14 Case *Gea Catalàn v. Spain*, 10 February 1995, HRCd Vol. VI, No. 1.

15 Case *Pélissier ir Sassi v. France*, No. 25444/94, ECHR 17, 1999-II.

16 Case *Dallos v. Hungary*, No. 29082/95, § 47-53, ECHR 2001-II.

17 Case *Sadak and others v. Turkey* [GC], No. 10226/03, § 12 ECHR 2001-II.

18 Case *Sipavičius v. Lithuania*, No. 49093/99, § 30, ECHR 2001-II.

19 The author notes that the interpretation of the principle of immutability provided herein is based exclusively on the above-provided possible practical situation.



assessment of criminal deeds and so on. All the said information as well as the procedural requirements of the EAW are the subject of the right to question the possibility (limits) of criminal prosecution. An objective assessment of the abovementioned issue is impossible if only the subject engaged in invoking measures for criminal prosecution is aware of it. Thus, it substantiates the author's position, namely: an application of the competent institution of Lithuania to a foreign state for an assent to criminal prosecution should ensure an adequate equivalence of the procedural functions of prosecution and defence. In other words, each statement should be accompanied by a denial. In case of the examination of an application of the competent institution of Lithuania to the EU Member State for an assent to criminal prosecution of a person in Lithuania, when such a person is in Lithuania *de facto* (and is arrested, in addition), the provision of such an assent is, in principle, equal to the surrender of such a person to the Republic of Lithuania *de jure*, not *de facto*. In such a case, to the best belief of the author, the procedural guarantees under Article 11 Part 2 and Article 12 Part 2 of the Framework Decision as well as other provisions on the right of a person under surrender to have a defence lawyer with unrestricted powers of questioning the legitimacy and validity of the possibility (limits) of the future criminal prosecution remain the same.

After having summarized the above-submitted statements and in support of the standpoint of certain authors, it becomes evident that only the ensured realization of the suspect's right to question the possibility and limits of criminal prosecution creates the necessary preconditions for a suspect to realize his/her right to get to know (to be informed on) all key legal and actual aspects of the case under investigation within a reasonable term before giving testimony and explanations or otherwise presenting his/her own standpoint; in such a case, a person brought to criminal account would be undoubtedly provided with a more effective opportunity to realize his/her right to be heard and thus the right to defence as well. On the other hand, it is also important that such knowledge and ability of telling everything suppose a higher probability of passing a more fair (in both legal and actual aspect) procedural judgment; an audience of a person increases the power of the judgment passed in respect of such a person—only a person given a hearing may consider the judgment passed in respect of him/her fair (more just).<sup>20</sup>

## 2. Impossibility of Criminal Prosecution of a Non-Surrendered Person: the Problem of the Interpretation of Legal Provisions

A person surrendered by a foreign state cannot be arrested, brought to criminal account and convicted in the Republic of Lithuania for a criminal deed committed before his/her surrender, if such a deed did not serve as the grounds for surrendering (Article 70 Part 1 of the CCP<sup>21</sup>). In such a way the limits of the criminal account of a person

20 Merkevičius, R. *Baudžiamasis procesas: įtariamojo samprata* [Criminal Procedure: The Concept of the Suspect]. Vilnius: Teisinės informacijos centras, 2008, p. 368–369.

21 It should be noted that the provision of Article 70 Part 1 of the CCP, before alteration by Law No. IX-2170

surrendered to Lithuania under the EAW for the deeds serving as the grounds for the EAW are defined. In respect of other criminal deeds, irrespectively of the fact that they were committed before the surrender and *no* criminal procedure was initiated in respect of them or they were committed before the surrender and the criminal procedure was initiated in respect of them and then cancelled because the person hid in a foreign state, the problem of criminal prosecution *in personam* cannot be raised. By the way, it should be noted that if it is revealed that the criminal deed other than the deed serving as the grounds for surrendering the person was committed by the person, the latter cannot become a subject of criminal prosecution before obtaining an assent of the state having surrendered the person, except the cases when the exceptions specified in Article 27 Part 3 Paragraphs a-f of the Framework Decision are applicable. In the abovementioned case *Leymann and Pustovarov v. Kihlakunnansyyttäjä*, the CJEC stated that the applying state can initiate or can continue criminal prosecution of a person or can judge such a person for the deeds other than the ones serving as the grounds for the surrender even in the case when the punishment related to the restriction of the person's liberty can be imposed for such deeds, if personal liberty of the person is restricted neither during the process nor after its finalization (Paragraph 74); a surrendered person may be prosecuted for such a criminal deed, if a measure for the restriction of the person's liberty (in this case, an arrest) is not applied in the phases of investigation and procedure related to the said deed (Paragraph 76).<sup>22</sup>

Thus, coming back to the fountainhead of the paper related to the above-described practical situation, it becomes evident that, according to the EU legislation and internal legislation (related to the criminal procedure) of Lithuania, a person surrendered to Lithuania under the EAW for criminal deeds and held in detention cannot be subject to criminal prosecution for other criminal deeds (i.e. the criminal procedure cannot be renewed and continued) irrespectively of the fact that the criminal procedure in respect of them was initiated before the hiding of the person in a foreign state (and then, of course, was cancelled) until an assent of the state having surrendered the person is obtained. The said requirement is fixed in the legal norms and itemized in the case-law; thus, it seems to be clear and causing no misinterpretation of its realization. However, in the case under discussion, misleading interpretation and application of the law are unavoidable as well. Such a situation is unacceptable and even regrettable in the legal aspect: the suspect's lawful interests are only a vision and nothing more, as if the 'eyes' of the criminal procedure are swamped. Thus, the greatest anxiety is caused by the interpretation of the concept of the 'prohibition of bringing to criminal account' for deeds other than the ones serving as the grounds for the surrender of the person under the EAW.

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passed by the Seimas of the Republic of Lithuania on 27 April 2004 (*Official Gazette*. 2004, No. 2-2493), was formulated as follows: 'A person extradited by a foreign state cannot be called to criminal account and convicted in the Republic of Lithuania as well as cannot be transferred to a third state or brought to the International Criminal Court for a criminal deed other than the one serving as the grounds for extradition without a prior assent of the foreign state having extradited such a person'.

22 Case C-388/08 *Artur Leymann and Aleksei Pustovarov v. Kihlakunnansyyttäjä*, *supra* note 10.

It was found that in practical activities of a legal institution, the prohibition of bringing to criminal account for the criminal deed other than the one serving as the grounds for the surrender of the person is often interpreted (in violation of the purpose of the Framework Decision) as the prohibition of passing a conviction in respect of such a person by the court. It is pointed out that an assent of the state having surrendered the person to carrying out procedural actions in a renewed investigation and a closer definition of the suspicions in respect of the person on the grounds of the data collected in the course of the investigation, related to the criminal deed (the subject of a criminal procedure initiated before the person's hiding in the foreign state and the pre-trial investigation cancelled after the person's hiding) other than those serving as the grounds for the surrender of the person, is not necessary. Such an interpretation of the law is absolutely non-approvable. *Firstly*, the purpose of the Framework Decision (reflected also in Article 17 of the CCP which provides that the EAW is a decision of a court institution on the basis of which the other EU Member State is obliged to arrest and surrender the person mentioned in the decision *for initiating criminal prosecution of the said person* and so on) is ignored. *Secondly*, the different concepts of *bringing to criminal account in rem* and *bringing to criminal account in personam* are identified. *Thirdly*, the levers of the perception of the initiation (continuation) of criminal procedure *in rem* and the initiation of this process *in personam* are not equal.

It was already mentioned that a person cannot be brought to criminal account for the deeds other than the ones serving as the grounds for his/her surrender to Lithuania. For the initiation of the criminal prosecution of such a person for the deeds other than the ones serving as the grounds for his/her surrender, an assent of the foreign state having surrendered the person is required (Articles 17<sup>1</sup> and 70 of the CCP). Thus, the concept of bringing to criminal account is directly related to the essence of the criminal prosecution of a person: the institutions authorized by the state (specified in Articles 164 and 165 of the CCP) take the measures specified in the laws in respect of the specific person *in personam* striving for rapid and detailed disclosure of the criminal deeds and for proper application of the provisions of the law in order to ensure duly sentence of the person having committed the criminal deed and to avoid the conviction of any guiltless person. Bringing to criminal account *in rem*, as compared to bringing to criminal account *in personam*, according the position provided in scientific literature, is related to the beginning of criminal procedure.<sup>23</sup> The grounds for such an interpretation of the legal terms was predetermined by the cassation ruling No. 2K-280/1999 of the plenary session of the Supreme Court of Lithuania as of 12 November 1999 (referred to as the classical ruling) where the Court had pointed out that ‘[t]he term “bringing to criminal account in personam” should be understood and interpreted as a term of the criminal law.... So, the term “bringing to criminal account in personam” should be neither identified with nor related to any intermediate phases of the investigation of a criminal case provided

23 Nevera, A. Baudžiamosios jurisdikcijos taikymo Lietuvos Respublikos piliečiams, kurie pagal nacionalinius įstatymus naudojami imunitetu, problemos [The Problems of the Implementation of the Criminal Jurisdiction for Citizens of the Republic of Lithuania who, under the National Law, Enjoy Immunity]. *Jurisprudencija*. 2006, 1(79).

*in the laws on criminal procedure*' (emphasis added). The Court upheld the same view in its later case-law as well (for example, the cassation rulings No. 2K-643/2000, 2K-133/2001, 2K-388/2002, 2K-216/2010, 2K-331/2010). Thus, the prohibition (fixed in the law) of bringing a person to criminal account for the deeds other than the ones serving as the grounds for the surrender of such a person to Lithuania in the absence of an assent of the surrendering state to behave so means nothing else but impossibility to carry out any actions of criminal procedure or any actions related to criminal prosecution in respect of such a person. The key idea of Article 27 Part 2 of the said legal norm provides that '... a person surrendered may not be prosecuted, sentenced or otherwise deprived of his/her liberty...' <sup>24</sup> (emphasis added). It follows that the abovementioned provisions of the CCP cannot be interpreted otherwise than the provisions of the Framework Decision do. An analogous position was formulated by the CJEC (the Grand Chamber) in its judgment passed on 16 June 2005 in the criminal case *Criminal Proceedings against Maria Pupino* (case C-105/03) <sup>25</sup>. The CJEC pointed out that the compulsory character of the Framework Decisions passed according to the title part of the EU Treaty VI on cooperation of police and courts in criminal cases was formulated similarly to Article 249 Paragraph 3 (about directives) of the Treaty. It predetermines the duty of national authorities related to the explanation of the national law. Thus, a national court, while applying the internal law, should explain it taking into consideration the provisions and objects of the Framework Decision to the maximum possible extent in order to reach its goal and, thus, to follow Article 34 Part 2 of the EU Treaty. In addition, the principle of relevant explanation cannot substantiate *contra legem* of the national law. Nevertheless, this principle requires national courts to take into consideration the whole system of the national law, when necessary, for establishing the extent of its application in order to avoid the result contrary to the one pursued by the Framework Decision (Paragraphs 34, 43–45, 47, 61). Thus, according to the insights of Magno, the provisions of the EU and national law should be harmonized to avoid violations of the provisions of the EU law and ignorance of the traditions of the internal law. <sup>26</sup>

Thus, while speaking about the impossibility of criminal prosecution in respect of a person not surrendered to the Republic of Lithuania under the EAW, it should be taken into consideration that the said prohibition to carry out any actions of criminal procedure in respect of such a person is based on arguments of twofold character. The first group of arguments is bound with the purposes of international cooperation in criminal proceedings and its importance for intergovernmental goals in the struggle against crime, namely: *firstly*, a neglect of the said prohibition would cause a substantial violation of the principle of mutual recognition, which is the 'keystone' of the judicial cooperation of the EU Member States—its importance was emphasized for the first time

24 Tarybos 2002 m. birželio 13 d. pagrindų sprendimas 2002/584/TVR dėl Europos arešto orderio perdavimo tarp valstybių narių tvarkos [2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States]. [2002] OL, 19, 6.

25 Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

26 Magno, T. The Pupino case: background in Italian law and consequences for the national judge. *ERA Forum*. 2007, 8: 215–223.

in Paragraph 37 of the Conclusions of the European Council on 30 November 2000 in Tampere<sup>27</sup>. *Secondly*, ignorance of the position of the foreign state to be provided with an application for an assent would equal to ignorance of the absoluteness of the state's sovereignty.<sup>28</sup> *Thirdly*, a violation of the abovementioned prohibition would cause a negative liability of the state obliged to harmonize its national law with the EU legal system, because, as it was mentioned above, the competent national institution must apply the internal law with taking into consideration the provisions and objects of the Framework Decision to the maximum possible extent in order to reach its goal and, thus, to meet the requirements of Article 34. *Fourthly*, in addition to wrong interpretation and application of the Framework Decision, it would (more importantly) cause the down-grading of the Convention for the Protection of Human Rights and Fundamental Freedoms as the mother document.<sup>29</sup> The second group of arguments is bound with the purpose of the CCP of Lithuania, its actual and legal substantiation in a specific case, constitutionally defined by the model of criminal procedure, namely: *firstly*, the absence of an assent of the foreign state to criminal prosecution of the person would be equal to the grounds of the impossibility of criminal prosecution as provided for in Article 3 Part 1 Paragraph 3 of the CCP. *Secondly*, actions of state institutions violating the impossibility of criminal prosecution deny the principle of clarity of the law of the state. According to the said principle, in addition to the execution of any procedural legal action in conformity with 'the publicly accessible law', one more criterion of the quality of law, applicable to a legal norm, should be set; its core is the description of rules in the legal norm accurate enough to be usable by a person for the regulation of his/her conduct. In the case *Winterwerp v. Kingdom of Netherlands* (1981), the ECHR provided the meaning to the words 'according to the procedure, established by the law' by noting that 'the law itself should meet the Convention, including the general principles, fixed in the Convention'<sup>30</sup>. Thus, the concept of the term under discussion covers a fair and duly process.<sup>31</sup> *Thirdly*, the impossibility of criminal prosecution of a non-surrendered person is based on the constitutional requirement for the model of criminal procedure mentioned by the Constitutional Court of the Republic of Lithuania. According to the Court, the legal regulations of relations bound with criminal procedure should ensure the formation of legal preconditions for the rapid and detailed disclosure of criminal deeds and just punishing of the persons having committed such deeds (or a settlement of the problem of their criminal account in another way), also the legal preconditions for avoiding conviction of any guiltless person. The Court emphasized that, *inter alia*,

27 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. [2001] OJ C 12 E, 2001 1 15, p. 10.

28 See Case C-388/08 *Artur Leymann and Aleksei Pustovarov v. Kihlakunnansyyttäjä*, *supra* note 10.

29 Zupančič, B. M.; Callewaert, J. Relationship of the EU Framework Decision to the ECHR: towards the fundamental principles of criminal procedure. *ERA Forum*. 2007, 8: 265–271.

30 Convention for the Protection of the Human Rights and Fundamental Freedoms. *Official Gazette*. 1995, No. 40-987.

31 Losis, E. *Procesinės prievartos priemonės baudžiamajame procese* [Procedural Coercive Measures in Criminal Procedure]. Ph.D. diss. Vilnius: Mykolas Romeris University, 2010, p. 72–73. See also: Panomariovas, A.; Losis, E. Proportionality: from the concept to the procedure. *Jurisprudencija*. 2010, 2(120): 257–269.

it is binding to strive for the avoidance of groundless restriction of the rights of persons having committed the criminal deeds.<sup>32</sup>

To summarize, no criminal procedure can be initiated and no procedural investigational actions (*i.e. bringing to criminal account in personam*) can be initiated in respect of a person who is in Lithuania but was not surrendered to it under the EAW until an assent to behave so is obtained from the foreign state having surrendered such a person.

## Conclusions

1. The EAW is the first instrument of international cooperation in criminal proceedings between the EU Member States, via which the principle of mutual recognition, as the fundamental (from the point of view of its efficacy) landmark in the interstate relations of such a nature, is being realized in practical activity. During the process of the transposition of the provisions of the Framework Decisions into the national law and their application, the EU Member States, Lithuania as well, must seek for the implementation of the national law, harmonized according to the EU law by keeping to the provisions and purposes of the Framework Decisions. Thus, dialectic (contradictory) application of the provisions of the EU and national law would be avoided.

2. Article 70 Part 1 of the CCP providing that a person surrendered by a foreign state on the grounds of the EAW cannot be detained, brought to criminal account and sentenced for a criminal deed committed prior to his/her surrender, for which he/she was not surrendered, does not mean anything else, but a prohibition to execute any criminal proceedings in respect of such a person. In this case, the impossibility to bring the person to criminal account is related with the impossibility of the criminal proceedings *ab initio*, directed towards the beginning of criminal prosecution of the person.

3. It is ascertained that, prior to addressing the foreign state which has surrendered a person to Lithuania on the grounds of the EAW for other criminal deeds, the law enforcement institutions of the Republic of Lithuania, seeking to obtain the consent for starting the criminal proceedings in respect of the same person for the criminal deeds for which he/she was not earlier surrendered, is obliged to inform the person (his/her defence lawyer, representative) about it. Otherwise such a person's right to question the possibility and the limits of criminal prosecution would be violated.

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32 The Constitutional Court of the Republic of Lithuania ruling of 16 January 2006 'On the compliance of paragraph 4 (wording of 11 September 2001) of Article 131 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania, on the compliance of paragraph 5 (wordings of 10 April 2003 and 16 September 2003) of Article 234, paragraph 2 (wordings of 10 April 2003 and 16 September 2003) of Article 244, Article 407 (wording of 19 June 2003), paragraph 1 (wording of 14 March 2002) of Article 408, paragraphs 2 and 3 (wording of 14 March 2002) of Article 412, paragraph 5 (wording of 14 March 2002) of Article 413 and paragraph 2 (wording of 14 March 2002) of Article 414 of the Code of Criminal Procedure of the Republic of Lithuania with the Constitution of the Republic of Lithuania and on the petitions of the Šiauliai District Local Court, the petitioner, requesting to investigate whether Article 410 (wording of 14 March 2002) of the Code of Criminal Procedure of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania'. *Official Gazette*. 2006, No. 7-254.

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## EUROPOS AREŠTO ORDERIS: KAI KURIE TEISĖS AIŠKINIMO IR TAIKYMO ASPEKTAI

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**Santrauka.** *Straipsnyje nuosekliai nagrinėjami kai kurie svarbūs Europos arešto orderio teisės aiškinimo ir taikymo aspektai, susiję, pirma, su asmens teise kvestionuoti baudžiamąjį persekiojimą galimumą (ribas), antra, – su negalimumu vykdyti baudžiamąjį persekiojimą asmens, kuris nėra perduotas Lietuvos Respublikai. Straipsnyje atliekama teisės doktrinos ir teisinės praktikos analizė leidžia teigti, kad vis dėlto teisinėje praktikoje Europos arešto orderio vykdymo procedūros, skirtingai nei tai numato Europos Sąjungos teisės aktų nuostatos ir jų tikslai, nacionalinėje teisėje aiškinamos neleistinai klaidingai. Suprantama, tai lemia nepakankamas Lietuvos vidaus ir Europos Sąjungos teisės aktų nuostatų įgyvendinimo, Europos Bendrijų Teisingumo Teismo jurisprudencijos suvokimas. O tai lemia asmens, trauktino baudžiamojon atsakomybėn, teisės žinoti, kuo yra įtariamas (kaltinamas), pažeidimus.*



*Asmens teisė kvestionuoti baudžiamojo persekiojimo galimumą bei ribas, kiek tai susiję su tarptautiniu bendradarbiavimu baudžiamajame procese, yra konstituciškai pagrįsta garantija, taip pat pretenzija į kompetentingų teisėsaugos institucijų vykdomos baudžiamosios procesinės veiklos teisinį tinkamumą, pagrįstumą. Deja, tačiau šioji garantija, ypač kai tai susiję su tarptautinio bendradarbiavimo baudžiamajame procese teisinių instrumentų taikymu, neretai yra daugiau ar mažiau pažeidžiama, netinkamai aiškinami šios garantijos svertai, jos esaties pagrindai ir formos. Galiausiai negalimumas vykdyti baudžiamąjį persekiojimą asmens, kuris nėra perduotas Lietuvos Respublikai, rodo, jog kol asmuo nėra perduotas Lietuvai (nėra gautas jį perdavusios užsienio valstybės sutikimas), baudžiamasis procesas Lietuvos Respublikoje tokio asmens atžvilgiu apskritai negalimas ir neįmanomas ab initio. Tačiau pastebėtina, kad šis teiginys svarbus pabrėžti tuo, jog vis dėlto praktinėje teisėsaugos institucijų veikloje kartais nėra paisoma minėto draudimo, kai kurie Pagrindų sprendimuose numatyti teisiniai imperatyvai vertinami labiau kaip formalūs, todėl ne visuomet uoliai vykdomi.*

**Reikšminiai žodžiai:** *baudžiamasis procesas, Europos arešto orderis, tarptautinis bendradarbiavimas baudžiamajame procese, įtariamasis, atsakomybės ribos.*

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