Appearing in person – multiple hearings

The executing judicial authority may refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision.

The concept of "presence at the trial resulting in the decision" doesn't leave room for interpretation if the trial consists of only one hearing and the verdict is rendered immediately. However, what if the verdict is rendered at a separate hearing and the defendant suddenly shows up or – being the topic of my contribution today – what if the trial consists of several hearings where the defendant was present at some of those hearings and absent at others?

The situation that the defendant was present at some but not all of the hearings held within one and the same instance, raises a number of questions:

Firstly, if the trial resulting in an in absentia judgment of conviction consisted of several hearings and the defendant was present at one or more but not all of these hearings, has the condition that 'the person did not appear in person at the trial resulting in the decision' been met;

Secondly, does it matter what transpired at the hearing(s) at which the defendant was present or is the mere presence of the defendant at one of the hearings enough to preclude the applicability of Art. 4a(1) and

Thirdly, if it does matter what transpired at the hearing(s) at which the defendant was present, on the basis of which criteria does one establish whether the defendant was present 'at the trial resulting in the decision'?

Some issuing judicial authorities designate such situations of a nonsustained presence as 'appearance in person', others as 'non-appearance in person'.

One of the reasons, not to say the main reason, for this divergence seems to be the distinction in continental law between contradictory proceedings, leading to so-called judgments after trial, and proceedings in absentia, leading to judgments rendered in absentia. The distinction has a huge impact on how the national proceedings are or could be conducted and on possible recourses against the judgment.

At the moment, the Court of Justice uses the term “in absentia” only in relation to the absence of the person concerned at his own trial, without any further specifications. This allows Member States to continue to apply national concepts when filling in European Arrest Warrant.

I would like to present you five considerations.

Firstly, there is a difference between being present at a trial, appearing at a trial and participating in a trial. The defendant can without identifying himself, be present in the court room and just listen to what is happening and what evidence is presented against him. As such, he is present but he is not appearing. He can also appear without actually participating in the trial: he can sit before the judge and refuse to answer questions from the court or refuse to challenge the evidence or the accusations. The use of the verb ‘appear’ in the wordings of article 4a indicates that a certain level of involvement of the defendant at the trial is required.

Secondly, focusing on how the court names its judgment can also be tricky. After all, the nature of a judgment should not be defined by its wordings but by law. The law must state when a judgment is rendered in absentia or not.

Thirdly, appearing in person will not necessarily lead to contradictory proceedings or to a judgment after trial.

Under Belgian criminal procedural law a judgment can only be a judgment after trial if the defendant, optionally assisted or represented by a lawyer mandated by him, was present at all hearings of the trial where evidence or charges were presented or a debate on the penalty to be imposed was held and the defendant had the opportunity to rebut or comment. What happened at the hearings is therefore decisive. If discussions arise as to what exactly happened at a hearing, the registrar's report of the hearing will be decisive.

There is however one specific legal situation in which the judge is obliged to name his judgement after trial instead of in absentia. This is to sanction the behaviour of the defendant and to deny him the legal recourse of opposition. The following conditions must be met:

- the defendant or his lawyer was present at the initial hearing
- the case was postponed
- the court ordered the personal appearance of the defendant at the next hearing or issued an order to bring the defendant to court
- that order was properly served to the defendant or the order to bring the defendant to court could not be executed
- at the next hearing both the defendant and his lawyer remain absent

Fourthly, a judgement after trial can also be rendered without the defendant or his lawyer having been present. Article 503-1 of the French Criminal Procedure Code states that all summons, notifications and service done at the last address indicated by the defendant is considered to be a service in person. If the defendant remains absent at his trial without justification a judgment after trial will be the result.

And finally, a person can also appear at only one hearing, for instance the first hearing. In the Netherlands, the appearance of the defendant at one of those hearings suffices to consider the proceedings from then on as contradictory proceedings, even if the defendant fails to appear at the next hearing. They even have an adage for this situation that states that 'contradictory proceedings remain contradictory proceedings'.

Because article 4a is only applicable on condition that the requested person did not appear in person at the trial which resulted in his conviction, further fine-tuning of this concept is absolutely necessary.

This fine-tuning is even more important when another aspect is highlighted. Article 4a(1) of the EAW Framework Decision seeks to guarantee a high level of protection and to allow the executing judicial authority to surrender the person concerned despite that person's failure to attend the trial which led to his conviction, while fully respecting his rights of defence". If the issuing authority states that article 4a is not applicable, it, therefore, necessarily follows that there is a presumption that the requested person's rights of defence were fully respected if he was present at the trial which resulted in his conviction.

Against this background, three possible interpretations present themselves:

Firstly, to exclude the applicability of Art. 4a(1), the defendant must have been present at every hearing;

Secondly, to exclude the applicability of Art 4a(1), it suffices that he was present at only one of the hearings, regardless of what transpired at that hearing and

Thirdly, to exclude the applicability of Art. 4a(1), the defendant must have been present at the hearing(s) at which the court dealt with the merits of the case.

In my opinion the third interpretation is the most appropriate course of action as it enhances the procedural rights of the person concerned and, at the same time, facilitates judicial cooperation in criminal matters. If the defendant was present at the hearings at which the court dealt with the merits of the case, one may safely assume that he had the opportunity to defend himself and that, therefore, the executing judicial authority can order his surrender in the knowledge that his rights of defence were fully respected. This interpretation is also in line with Art. 6 ECHR. The ECtHR's case-law shows that it is indeed relevant what transpired at a hearing at which the defendant was not present.

I would like to refer you to chapter 5.3.5 of the report for an further in-depth study and I thank you for your attention.

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