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RECENT DEVELOPMENTS IN CRIMINAL LAW IN BELGIUM ECBA CONFERENCE LYON 5-6 OCTOBER 2007

I. The Leemans-case and its consequences: recent problems in the Tampere-doctrine

In December 2006, Els Leemans, a Dutch national, was convicted to 25 years of imprisonment by the Court of "Assisen" (jurisprudence by jury) of Antwerp for the murder on her husband Ran Biemans. Her former lover and allegedly her partner in crime, Wilco Ites, walked free. This decision of the jury was remarkable as such (Els Leemans being found guilty, her toy boy walking free), the execution of the sentence deserves even more attention.

Els Leemans did not remain in provisional detention at the moment of the trial and was not arrested immediately after her conviction. She fled Belgium and moved to the Netherlands.

Having left the Belgian territory, the execution of the sentence became problematic: Belgium issued a European Arrest Warrant.

The Dutch authorities however made a reserve when implementing the Framework Decision on the European Arrest Warrant. They stated that no Dutch citizen would be handed over to foreign authorities, but that sentences from foreign judgments would instead be executed in the Netherlands on Dutch citizens residing there. The Netherlands found it necessary to make such a reserve to prevent nationals from undergoing sentences abroad, away from their relatives.

Thus, The Nederlands refused to hand Els Leemans over to the Belgian authorities…

Of course, apart from the Framework Decision, other Treaties exist on the base of which the execution of sentences can take place in another state than the state which imposed it.

Unfortunately Belgium lacked to ratify these Treaties, so the Netherlands could not execute.

This coincidence of circumstances caused a major problem: on the one hand Els Leemans could not be handed over to Belgium in order to execute her sentence (because of the reserve made by the Netherlands to the Framework Decision on the European Arrest Warrant), on the other the Netherlands could not go over to execution themselves (because of Belgium lacking to ratify the existing treaties).

This case clearly illustrates how all the efforts made to obtain reciprocal recognition of judicial decisions in criminal cases in the light of the Tampere-goals, can fall short to result in a satisfying solution in complex cases.

The Tampere European Council held in October 1999 agreed on political guidelines and priorities to transform the European Union into an area of freedom, security and justice by using all the opportunities offered by the Treaty of Amsterdam.

The Netherlands eventually started the execution of the Belgian sentence imposed to Els Leemans. They found a legal backdoor, undoubtedly because of the diplomatic efforts between both Member States,

The "Officier van Justitie" (the public prosecutor) asked 12,5 years of imprisonment for Els Leemans, in view of the sentence Leemans should (effectively) undergo when it would be executed in Belgium.

In Belgium, a convicted person can be released after he/she has served 1/3 of the imprisonment sentence, i.c. 1/3 of 25 years or 8 years and 4 months.

In the Netherlands on the contrary, early release is only possible after 2/3 of the sentence, i.c. also 8 years and 4 months.

In other words, this time period of 12,5 years of imprisonment was met by requesting an imprisonment of 3,5 years, corresponding with the remaining period of imprisonment in the hypothesis that she would have resided in Belgium. Indeed, Els Leemans already served a preliminary detention of 4,5 years.

This was the outcome of the judgment of October, the 1st, 2007.

II. The execution of imprisonment sentences: the legal position of convict and victim

The Royal Decree of January 29th 2007, published in the Belgian State Gazette on February 1st 2007 on the implementation of art. 2, 6° of the Statute of May 17th 2007 on the external legal position of convicts to an imprisonment sentence and the rights of victims within the framework of sentence implementation modes, organises a larger participation of victims in the debate with regards to the implementation of the imprisonment sentence of their aggressors.

This decree formalises and implements the right of victims to be informed when they have asked to be informed and to be heard about the mode of implementation of the sentence.

So doing, Belgium is moving towards a greater participation of victims in criminal proceedings, not only during the criminal investigation, but also during and after trial.

The practical importance of this new statute is not to be underestimated: it aims at preventing uneasy and uncomfortable situations of victims being confronted with their aggressors, living f.e. only 1 block away from them because they have been released early without their knowing.

III. New item in Traffic Regulation: a general obligation of vigilance

The federal Statute of March 20th 2007 changes the coordinated Statutes of March 16th 1968 concerning the regulation of traffic and the Statute of February 22nd 1965 and was published in the Belgian State Gazette on April 6th 2007.

This statute is innovative by introducing a general obligation of vigilance in criminal traffic cases. The former statutes contained no less than 19 references to a general or specific obligation of vigilance…

In order to understand the content of this obligation, 4 guidelines are to be considered:

- It is forbidden to behave in a manner that causes/can cause danger, or in a way that impedes other road users.
- Every driver should be physically capable of driving and should possess the required knowledge and driving skills.
- Drivers should be extra vigilant for more vulnerable road users, such as cyclists and pedestrians. Depending of the kind of transportation used (a truck doesn't equal a Fiat Cinquecento), drivers should be more careful than others.
- It is forbidden to provoke or challenge a road user to perpetrate the regulations of traffic.

The judge should of course always look at the specific situation of the individual case. Nevertheless, the new general obligation aims to have a scope that reaches every perpetration of the existing regulations. Using this provision, a creative judge should be able to sanction every irresponsible act in traffic.

IV. The 'Lernout & Hauspie' case

In May 2007, the 'Lernout & Hauspie' case, the Belgian equivalent of the Enron case, came to trial before the Court of Appeal in Ghent,

This case is the criminal exponent of the bankruptcy of the company 'Lernout & Hauspie Speech Products', a Belgian high tech company which made big furore in the late nineties.

Two individuals, Jo Lernout & Pol Hauspie, developed speech technology applications and conquered the world with their innovative products.

The believe of the public and of the Belgian politicians (including the Belgian royals), who were eager to take part in the success of the company, was huge.

A lot of people bought shares, and politicians took mandates in the company.

The collective indignation on the moment of bankruptcy was likewise.

Everything started with some critical press releases in the Wall Street Journal with regards to false turnover recognition mechanisms, bringing the value of the shares down.

Parallel with the bankruptcy, a criminal investigation started which led to the prosecution of 22 individuals and companies: the directors of LHSP, the legal advisors of the company, some affiliated companies/investors, the auditor (KPMG), the house banker (DEXIA BANK) as well as one director of the bank.

All charges are based upon or deducted from the above mentioned false turnover recognition mechanisms.

In the course of May and June, procedural issues were raised by the defense on 7 consecutive hearings.

These procedural issues all had to do with the fact that the public prosecutor summoned the accused directly before the court of appeal, thereby skipping at least (cfr. infra) one instance.

This was justified solely on the basis of the so called 'priviledge of jurisdiction' of one of the accused (a substitute magistrate).

This principle aims to avoid orchestrated prosecutions against magistrates (and too severe or too light sentences as a result of this) and is based on the principle of separation of institutional powers.

One can however hardly call this a priviledge, especially not for the 21 other accused, who have to follow the faith of this magistrate given the fact that the public prosecutor claims that the crimes they allegedly committed are the same or at least connected with the crimes allegedly committed by this magistrate.

The question whether the crimes committed are indeed the same or at least connected, will only be answered by the judge when he makes his assessment of the merits of the case.

It is therefore difficult, not to say practically impossible for the defense to dispute this connection, whithout going into the facts of the case.

Besides from this and from the evident problem of losing one instance (the accused appear directly before the court of appeal), there is an even bigger problem: the accused lack the rights of defense which are granted in a 'normal' criminal procedure at the end of the criminal investigation.

Normally, after the judge of instruction has terminated his investigation, the public prosecutor formulates his claim and brings the case before the court of first instance, acting in chambers.

The suspected have, at that time, the right to consult the criminal file and to request the execution of additional investigating measures, whenever they feel that this is necessary.

Furthermore, the suspected can claim before the court that the investigation has not been conducted in a proper way or argue the incompleteness of the investigation and even the nullity of the investigation/parts of it, evidently entaming consequences for the prosecution based upon it.

These hearings find place behind closed doors: only the parties involved are allowed to be present.

At these hearings, the suspected can also argue that the investigation has revealed no grounds for their prosecution.

The judge will answer their argumentation in a formal judgment (that can be appealed), in which he orders the referral to the criminal court or confirms that there are no grounds for further prosecution or that further investigation is needed.

This is considered to be a crucial right of defense, i.e. the possibility to have a judge looking into the existence of sufficient grounds for prosecution, before having to defend oneself at a public hearing.

The fact that these rights are denied to the 22 accused in the Lernout & Hauspie case because of the principle of priviledge of jurisdiction was subject of several exceptions raised by the defense.

Indeed, pertinent questions were raised with regards to the legality of this procedure and the difference thus created as opposed to 'normal' criminal procedures (conformity of this procedure with the constitution).

All these exceptions led to a court ruling on June, 26, 2007, in which they were all either turned down, either postponed to the evaluation of the merits of the case (and thus, losing there pertinence).

On the first of October, the hearings on the merits of the case started.

To be continued.

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