

**EU Criminal Law for Defence Counsel
Riga 29-30 May**

JOINT DISCUSSION – DUAL DEFENCE

NETHERLANDS AND PORTUGAL

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CASE A – EAW (DUAL CRIMINALITY, NATIONALITY, EXTRATERRITORIALITY)

Carlos Silva, Portuguese Citizen, has incurable cancer. There is no hope for a cure, but it may take years for him to die. In the meantime, he must live in excruciating pain. Carlos decided, together with wife, Maria, also a Portuguese Citizen, to terminate his life and end up the suffering. They talked to many physicians in Portugal, but could not find a solution, since Portuguese euthanasia and assisted suicide are illegal in Portugal (punishable with up to 3 years imprisonment, according to article 134 – homicide by request of the victim – or article 135 – assisted suicide – of the Penal Code). Maria *googled* the Internet and found a Dutch clinic in Amsterdam where Carlos could get the required assistance.

They both travel to the Netherlands and Carlos finally manages have his suffering terminated. The body is transferred back to Portugal, where the funeral ceremony takes place. Manuel, Carlos' brother, is shocked when he finds out about the euthanasia performed in the Netherlands, since he is a fervent catholic and God and the Church proscribes such a sin. Since he always never had a good relationship with his sister-in-law Maria, he reports the facts to the police.

The public prosecutor investigating the case issues a rogatory letter asking the Dutch authorities to gather the following evidence:

- Witness interviews (clinic employees)
- Medical records.

At the same time, the public prosecutor issues an EAW against the physician who performed treatment (see Annex).

The Portuguese public prosecutor also issues a freezing order asking for the freezing of the clinic's accounts where the price paid for the euthanasia procedure has been credited.

On May 30th the clinic calls your law firm asking for assistance, since the police just arrived in order to arrest the physician and they also served a notice of a freezing of their accounts based on the Portuguese freezing order.

a) Attending Amsterdam's District Court acting as a defence lawyer for the physician, you are given a copy of the EAW.

1. What do you have to do immediately?
2. What defences do you have in the Netherlands?
3. Is it possible to have the EAW revoked in Portugal?
4. Can your client get bail?

b) What about the freezing order, what can be done?

**CASE B – EAW (EVIDENCE GATHERING ABROAD, SUPERVISION ORDER, NATIONALITY, NE
BIS IN IDEM, CONFLICTS OF JURISDICTION, TRANSFER OF SENTENCED PERSONS,
PROBATION ORDER, CONFISCATION)**

One of the main banks in Portugal has gone bankrupt. In its last months of activity the President, a Portuguese Citizen, and CFO forged accounts and conned thousands of investors into buying A-rated bonds, while they were fully aware that the bank was substantially in default and that investors would never get their money back. When the bank finally went bankrupt, investors found out that they would never get their money back and filed criminal complaints.

A group of Dutch investors filed a complaint in the Netherlands, which lead the Dutch authorities to open an investigation for market abuse, forgery and fraud.

The Dutch prosecutor nevertheless needs evidence that is located in Portugal. He sends the Portuguese authorities a rogatory letter asking for a search to be conducted in the bank's premises and for documents held by the bank concerning those bonds and the investment made by the Dutch investors to be seized.

a) On April 30th your law firm is asked for assistance by the bank. The police are in their premises and the bank is concerned that the documents the police wish to seize are covered by banking secrecy. They are also particularly concerned that the bank may be held criminally liable for the facts described in the search warrant.

1. What advice can you give?
2. Can you invoke secrecy?
3. Can the bank refuse to give the documents? What if the Portuguese authorities subpoenaed the bank for the documents, instead of seizing them?
4. What are the available legal remedies?

After gathering all the necessary evidence, the Dutch prosecutor charges the banker and the CFO for market manipulation (punishable with up to 5 years imprisonment), forgery (punishable with up to 3 years imprisonment) and aggravated fraud (punishable with 2 to 8 years imprisonment) and issues an EAW against the banker.

In the meantime, the Portuguese prosecution authorities are also investigating the banker for these and for other crimes and they have extended the investigation to the damage caused to the Dutch investors.

b) Attending Lisbon Court of Appeals acting as a defence lawyer for the banker, you are given a copy of the EAW.

1. What do you have to do immediately?
2. What defences do you have in Portugal?
3. Is it possible to have the EAW revoked in Portugal?
4. Can your client get bail?

- c) The Portuguese prosecution services also bring charges against the banker and the CFO.
1. Where will they be tried?
 2. Are they able to choose the forum? How?
 3. If the CFO closed a deal with the Dutch authorities (guilty plea against 3 years suspended sentence and no confiscation order), may he be tried in Portugal?
 4. If the banker is convicted in the Netherlands and in Portugal, must he serve the two sentences?
- d) The banker has been convicted in the Netherlands – can he serve his sentence in Portugal? What if it was a suspended sentence?
- e) The Dutch court has also ordered confiscation of his assets in the amount of the damage caused to investors. Is it possible to have this confiscation order executed in Portugal?