

Communication concerning the decision of the Curia of Hungary
in criminal case n^o Bfv.II.254/2018

Based on the provisions of Chapter XXV of Act no. XIX of 1998 on the Code of Criminal Procedure (hereinafter referred to as the Code of Criminal Procedure), the accused person was tried *in absentia* and was sentenced to a non-suspended term of imprisonment by the courts of first and second instance.

The accused person submitted a petition for judicial review to the Curia of Hungary against the final judgement of the court of second instance and argued that he had been unable to be present at the courts' proceedings due to serving his prison sentence in Austria at that time.

The Prosecutor General's Office was of the opinion that the courts had not infringed the special procedural rules on *in absentia* proceedings in respect of the absent accused person. The requirements for the holding of such proceedings have been fully satisfied, therefore, it could be stated that the courts had held their hearings in the absence of a person whose presence had not been required by law.

In its decision, the Curia pointed out that the accused person's culpability in being absent is stipulated by section 529 of the Code of Criminal Procedure as a condition for the holding of *in absentia* proceedings. Such culpability can be established in a well-founded manner only if the courts concerned are unable, despite having taken all possible measures provided under law, to locate the accused person.

Based on Article 20, paragraph (1) and paragraph (2), point a) of the Treaty on the Functioning of the European Union, Article 8, paragraphs (1)-(4) of Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016, and section 25, subsections (1)-(2) of Act no. CLXXX of 2012 on Cooperation in Criminal Matters with the Member States of the European Union, the Curia took the position that, in the case of the absence of an accused person with European Union citizenship, the lower instance courts had failed to take all measures to find him by omitting to issue a European arrest warrant in addition to the national one. Although section 529, subsection (1) of the Code of Criminal Procedure only provides for the issuance of "an arrest warrant", the latter has to be issued at both national and European levels if the absent accused person holds the nationality of a European Union Member State, and even if such person has no known domicile in another Member State. It is only in that case that the legal requirements for the holding of *in absentia* proceedings can be fully met.

With regard to the above, the lower instance courts failed to comply with the procedural rules on *in absentia* proceedings and to duly summon the accused person to their hearings, which were therefore held in the absence of a person whose presence was required by law. By virtue of section 608, subsection (1), point d) of the Code of Criminal Procedure, the courts' failure constitutes an absolute procedural infringement which has to lead to the unconditional quashing of their decisions. The Curia did not agree with the prosecution services' viewpoint according to which the absolute procedural infringement had already been remedied as a result of the reopening of the courts' proceedings on the basis of section 408, subsection (1), point e) of the Code of Criminal Procedure. Hence, the Curia – having also regard to the provisions of the new Code of Criminal Procedure that had entered into force in the meantime – quashed the second instance decision and ordered the court of second instance to reopen its proceedings.

Budapest, the 12th of October 2018

Criminal Department of the Curia of Hungary