Aliens. Facilitation of unauthorized entry of foreigners by profession in the context of a criminal ring. Participation in a criminal organization. European arrest warrant, in particular European arrest warrant issued by German authorities against a Greek citizen. Mandatory refusal to execute the warrant when the crime was perpetrated within the Greek territory. Locus delicti. Prosecution of the requested person for the same act in Greece is not required. Double criminality. The above acts are punishable under Greek law as well, since under it they are characterized as participation in a criminal organization and forwarding of third country nationals to an EU-member territory in concurrence and by profession. Facts. Transfer of Arab and Afghan nationals, who lacked the necessary travel documents, from Greece to Dresden, Germany, with a specially arranged tourist bus (coach) and under inhuman conditions. The execution of the warrant against the person requested for the above acts is prohibited, as Greece is also considered as the place of commission. Lift of temporary detention.

Court of Appeal of Thessaloniki in Council, no. 108/2013

[*Council Composition*]

According to Article 1 para. 1, Law 3251 "The European arrest warrant is a decision or order by a European Union member state judicial authority issued to arrest and surrender a person, who is in the territory of another Member State of the European Union, provided that the person sought by the competent authorities of the issuing state in the context of criminal proceedings: a) so that a person who has already been prosecuted be prosecuted or b) to execute a penalty or a security measure, which deprives them of their freedom“.

Under Article 2 of the above Law the content and formalities of the European arrest warrant are provided for, in particular: a) identity and nationality of the requested person, b) name, address, telephone and fax number and email address of the issuing judicial authority c) mention of the enforceable judgment, the arrest warrant or the relevant judicial act, d) the nature and legal classification of the crime, e) a description of the circumstances of the crime, including the time and place of commission, and the mode of participation of the requested person in the offense, f) the penalty imposed, in the case of a final judgment, or the penalty range provided for the offense under the law of the issuing State, and g) to the extent possible, any other information on the crime and its consequences, while it is also stated that the warrant must be translated into the official language of the state of execution.

Article 9 par. 3 of the same law states that "Where the requested person does not consent to be taken into the custody of the issuing state, the competent judicial authority for issuing a decision executing the warrant is the Council of Appeal, in the district of which the requested person resides or is arrested”. Furthermore, under Article 5 of the above law "The European arrest warrant shall be issued for acts that are punishable under Greek criminal law by a custodial sentence or a custodial security measure, the upper limit of which is at least twelve months or in the case that a penalty or a measure has already been imposed, which deprive of liberty for an imposed sentence of at least four months", while under Article 10 para. 1 of this law, the European arrest warrant "is executed if: a) the offense, for which it the European arrest warrant was issued constitutes a crime under Greek criminal law, irrespective of its legal classification, which is punishable under the law of the issuing state by a custodial sentence or security measure of a maximum of at least twelve months ... b) the courts of the district where the warrant was issued sentenced the requested person to a custodial penalty or security measure of at least four months for an offense, which is classified as a misdemeanour or as felony under Greek law as well".

Furthermore, Article 11 of the same law provides for the cases where the execution of the European arrest warrant is prohibited. The Greek judge then as a judicial authority executing a European warrant, i.e. the external (legitimate issuing), such as for example, the issuing of the warrant by a judicial authority and its internal legitimacy (issuing for criminal offenses and for penalties that allow the surrender of the requested person), must subsequently examine whether any one of the compulsory grounds for refusal to execute the warrant referred to in Article 11 of Law 3251/2004 applies and if so, issue a negative judgment and refuse to surrender the requested person.

Included among the mandatory grounds for refusal of execution of the European arrest warrant is that of case g’ of the above article 11 of Law 3251/2004, which stipulates that the judicial authority decides on the execution of a European arrest warrant issued for an offense, which is considered under Greek law to have been committed entirely or partly within the territory of Greece or within a place treated as such. In the clear meaning of that provision when the act for which prosecution against a person will be brought by the requesting State, was committed at least in part on Greek territory, it is not permissible to execute the European arrest warrant, without it being a prerequisite, that the requested person is prosecuted in Greece for the same act. An argument that suffices to establish that this legal approach is correct was the *a contrario* argument that under the very same Article 11 case h’ prosecution for the same act in Greece is set as a negative condition in order to surrender a Greek national, while under following Article 18 case a’ it is set as a potential grounds for refusing to surrender an foreign national.

Furthermore, Article 88 para. 1 of Law 3386/2005 stipulates that "Ship, watercraft or aircraft commanders or captains and drivers of any means of transport, who transfer from abroad into Greece third country nationals, who have no right to enter the Greek territory or who have been refused entry for any reason, as well as those who collect them from entry points, external or internal borders, to forward them within the country or onto the territory of an EU member-state or a third country or facilitate their transportation or provide them with accommodation so that they can hide are punishable: ... b. With imprisonment of at least ten (10) years and a financial penalty of thirty thousand (30,000) to sixty thousand (60,000) euros for each transferred person, if the offender acts for the purpose of obtaining profit, by profession or by habit or is a recidivist or has the status of a civil servant or tourist or shipping or travel agent, or if two perpetrators or more act together ... ".

From that provision it is concluded that a crime is established that can be committed in a variety of ways, committed by any of the above prescribed ways, by persons who accept to transfer within Greece foreign nationals who have no right to enter its territory, or forward them within the country or facilitate their transfer or their forwarding, knowing their unauthorized entry as illegal immigrants (Areios Pagos judgment no. 837/2012).

In the case then that one facilitates the transfer and forwarding of foreign nationals who have no right to enter the Greek territory or who have been refused entry for any reason, from the Greek territory to other states, both Greece and the states where the trafficker intended to promote the foreign nationals are considered as places of commission (Areios Pagos judgment no. 200/2011).

Moreover, according to the provision of Article 16 of the Criminal Code [CC] the place where the perpetrator committed wholly or partly the criminal act or omission as well as the place where the criminal result was brought about or, in the case of attempt, should have been brought about according to the perpetrator's intention, is considered as the place of commission.

In the present case according to all the documents in the judicial file, including the dated 14.01.2013 European arrest warrant of the Prosecutor of Dresden, which has been legally translated into Greek and bears all the elements referred to in Article 2 of Law 3251/2004 and the oral pleadings of the above requested person before the Council at a public session, the following was established:

By virtue of the no. 103/05.02.2013 document of the Court of Appeal Prosecutor of Thessaloniki the 14.1.2013 European arrest warrant of the Prosecutor of Dresden against the Greek national ... (surname) .... (name) ..., born in ... together with all relevant accompanying documentation was passed on before this Council. Under this warrant, the arrest of the aforementioned person and her surrender to the issuing authority is requested, in order for her to stand trial for violating the "Law on Residence" and for her participation in a criminal organization and particularly for facilitating the unauthorized entry of foreign nationals by profession and in the context of a criminal ring, acts which are also criminal under Greek legislation (participation in a criminal organization, forwarding the nationals of third countries onto the territory of an EU member state), in concurrence by perpetrators who have acted by profession (Articles 45, 94 par. 1, 187 par . 1 CC and 88 par. 1b of Law 3386/2005).

Given that the requested person did not initially consent to her surrender to the issuing state, the present case is duly brought before this Council in accordance with the provisions of Articles 9 par. 3 and 18 of Law 3251/2004, by virtue of which the 13.6.2002 EU framework decision "on the European Arrest Warrant and the surrender procedures between Member States”, as published in the official Journal of the European Communities on 18.7.2002, was transposed into Greek Law.

With the abovementioned European arrest warrant the requested person in question is attributed verbatim with the following: "In a non-speciified time, but at the latest at the beginning of 2010, the separately prosecuted persons ... and ... as well as the irrevocably sentenced in the same case ... joined forces with others of a so far unknown number, creating separate structures to allocate tasks, in order to illegally transport and for an indefinite period of time Arabs, mostly Afghan nationals, who do not have the documents required for entry and stay in the Federal Republic of Germany, from Greece into Germany. The participants mainly used a specially arranged tourist bus (coach) with Greek license plate number ... for their illegal trafficking activities. The illegally transported persons were transferred in a manner inhumane and dangerous for their lives and over a long period of time in a crypt. In order to cover up their illegal trafficking [*the perpetrators*] used in their trips up to 28 people, who acting as alleged tourists in case of border controls would create the impression that it was an exclusively tourist trip.

The accused … joined the group at a time which cannot be specified, but at the latest before 6.3.2011. The participants, including the accused, had the purpose of obtaining profit of a fairly large amount and over a long period of time.

The accused … participated in the following crimes, during which she travelled as a "passenger" on the bus and for her participation in each of them she received 100 euros: 1. On 18.4.2011 the separately prosecuted …, ... and ... transferred 12 unidentified persons, probably Afghan nationals, who did not possess the required legal entry and stay documents, with the aforementioned modified bus up to Dresden. 2. On 10.07.2011 the separately prosecuted …, ... and ... transferred 12 unidentified persons, probably Afghan nationals, who did not possess the required legal entry and stay documents, with an unidentified bus, modified in the aforementioned way, into the Federal Republic of Germany up to Dresden. 3. On 7.8.2011 the separately prosecuted …, ... and ... transferred 8 unidentified persons, probably Afghan nationals, who did not possess the required legal entry and stay documents, as well as the separately prosecuted …, …, … and …, who also did not possess the required legal entry and stay documents with an unidentified bus, modified in the aforementioned way, into the Federal Republic of Germany up to Dresden, where the Afghan nationals got off in the area of the road ... (Dresden, Postal Code 01069) at around 13.30 o'clock. 4. On 14.8.2011 the accused ... and …, transferred 11 unidentified persons, probably Afghan nationals, who did not possess the required legal entry and stay documents, as well as ..., who also did not possess the required legal entry and stay documents, with a bus with Greek license plate no. ... modified in the aforementioned manner up to Dresden. The illegally transferred persons got off in an unknown part of the city at around 13.00 o'clock. 5. On 21.08.2011 the separately prosecuted …, ..., …, … and ... transferred 12 unidentified persons, probably Afghan nationals, who did not possess the required legal entry and stay documents, through the border point Altenberg, with a bus with Greek license plate no. ... modified in the aforementioned manner in the Federal Republic of Germany up to Dresden, where the Afghan nationals got off in an unknown part of the city."

These acts are stipulated and punished in Germany by the provisions of Articles 95 par. 1 sentence 3, 96 par. 1 sentences 1a and b and par. 2 sentences 1 and 2 and 5, 97 par. 2 of "Law on Residence of Foreign Nationals”, 25 par. 2 and 53 of the Criminal Code, as indicated in the abovementioned warrant, and also constitute acts punishable under the Greek legislation (participation in a criminal organization and forwarding third-country nationals onto the territory of an EU member state, in concurrence by persons acting by profession (Articles 187 par. 1, 94 par. 1 CC and 88 par. 1b of Law 3386/2005). Since however according to the above European arrest warrant, the requested person in question facilitated the illegal forwarding of illegal immigrants foreign nationals from Greece to the requesting country (Germany), the place of commission of the above crimes is considered in accordance with the abovementioned to be Greece as well.

Therefore, irrelevant of whether criminal charges were pressed against the requested person for the above offenses in Greece, in accordance with the aforementioned article 11 case g’ of Law 3251/2004, the execution of the warrant against her, who, it should be noted, is a permanent resident of Greece (Municipality of Ampelokipi, Thessaloniki, street ...), is refused.

In light of all the aforementioned, there is no legal case to execute said warrant and to surrender the requested person to the German authorities, while the temporary detention, which she is currently placed at by virtue of the no. 7/30.1.2013 Order the Appeals Prosecutor Thessaloniki, must be lifted.

R. K.