

Germany, Higher Regional Court 4th criminal section, application of ECJ C-489/19, 151 AusIA 106/19 (103/19) of 14/10/19, ECLI:DE:KG:2019:0626.4AUSLA103.19.00

Member State

 Germany

Topic

Mutual Trust, Independence of public prosecutor

Deciding Court Original Language

Kammergericht Berlin, 4. Strafsenat

Deciding Court English translation

Higher Regional Court, Berlin, 4th Criminal Section

Registration N

(4) 151 AusIA 106/19 (103/19)

Date Decision

14/10/19

ECLI (if available)

ECLI:DE:KG:2019:0626.4AUSLA103.19.00

National Follow Up Of (when relevant)

Preliminary Ruling of the Court of Justice (CJEU) of 09/19/2019

(C-489/19) NJ (*Parquet de Vienne*)

EU legal sources and CJEU jurisprudence

- Art. 6 Charter of Fundamental Rights of the European Union (CFR)
- Art 107 Rules of Procedure of the Court of Justice
- Arts. 1, 2, 6, 8 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

Jurisprudence mentioned by the national court:

- *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)*, C508/18 and C82/19 PPU, EU:C:2019:456

Jurisprudence mentioned by the CJEU:

- *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)*, C 508/18 and C 82/19 PPU, EU:C:2019:456
- *Özçelik*, C?453/16 PPU, EU:C:2016:860
- *Bob-Dogi*, C?241/15, EU:C:2016:385

ECtHR Jurisprudence

Not Applicable.

Subject Matter

Application of the preliminary ruling of the CJEU by the Higher Regional Court of Berlin. The request was made in the context of the execution in Germany of a European arrest warrant issued against NJ on 16 May 2019 by the *Staatsanwaltschaft* Wien (Public Prosecutor's Office, Vienna, Austria) and endorsed on 20 May 2019 by a decision of the *Landesgericht* Wien (Regional Court, Vienna, Austria). The Higher Regional Court of Berlin Court asked whether the concept of 'European arrest warrant' referred to in Article 1(1) of Framework Decision 2002/584 must be interpreted as covering EAWs issued by the public prosecutor's offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the issue of those arrest warrants, which must be endorsed by a court which, within the framework of that procedure, in order that they may be transmitted by the public prosecutor's offices, must check the conditions necessary for the issue and the proportionality of those arrest warrants

Legal issue(s)

Independence of the Court endorsing the EAW

In Austria, the prosecutors are subjects to the directions or instructions in a specific case from the executive, namely the Federal Minister for Justice. Therefore, it was unclear whether this body qualifies as judicial decision. The referring Court doubted the compatibility of the procedure for issuing a European arrest warrant in Austria with the guarantees of independence mandated by EU law and particularly by the OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau) ruling.

Request for expedited/PPU procedures

Request for urgent procedure in from of the CJEU (Article 107 of the Rules of Procedure of the Court.)

Interim Relief

Not Applicable.

National Law Sources

- Germany:
 - § 29 I IRG
 - Austria:
 - Art. 2(1) Law on public prosecutor's offices; ('the StAG'):
 - § 29 (1) Law on judicial cooperation in criminal matters with the Member States of the European Union; 'the EU-GJZ'
 - - § 5(1)(2), 87(1) 105, 171(1) Code of Criminal Procedure; 'the StPO' AUT
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Facts of the case

The Public Prosecutor of Vienna brought criminal proceedings against NJ for theft, thereby issuing a EAW, endorsed by the regional Court of Vienna. NJ was placed in provisional detention in Berlin, and he did not consent to simplified extradition. Since the German Court observed that the Austrian Public Prosecutor's Offices are subject to directions or instructions in a specific case from the executive, in this case the Federal Minister for Justice, it expressed doubts as to the compatibility of the procedure for issuing a EAW in Austria with the requirements arising from the judgment of 27 May 2019, OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau), C?508/18 and C?82/19 PPU, EU:C:2019:456), particularly with regard to the status of the Vienna's Public Prosecutor as a 'judicial authority'. As the law provides that the endorsement of the warrant will be provided by a court and the endorsement procedure includes an examination of the legality and proportionality of the EAW concerned and is subject to judicial review, the Higher Regional Court of Berlin considered that this would mean that the power to decide whether to issue a EAW ultimately rests with the court responsible for endorsing it.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Higher Regional Court of Berlin declared admissible the request for the surrender of NJ to Austria on the basis of a EAW issued by the public prosecutor's office in Vienna and subsequently endorsed by a decision of the Vienna Regional Court.

Agreeing with the reasoning of the CJEU, the Higher Regional Court of Berlin concluded that such an arrest warrant falls within the concept of a "European arrest warrant" in Article 1(1) of Framework Decision 2002/584, since, although the Austrian public prosecutor's offices may be subjected, directly or indirectly, to individual orders or instructions from the executive branch in connection with the issuance of such an arrest warrant, approval by a court prior to its transmission sufficiently guarantees independent and objective control of the conditions of issuance and the proportionality of said warrant.

In line with the reasoning of the CJEU, it has been considered that the EAW system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national decision such as the EAW is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision. Since the issuing of a EAW which is capable of impinging on the right to liberty of the person concerned as mandated by Article 6 of the Charter, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.

Relation of the case to the EU Charter

The EU Charter was invoked as the relevant parameter for the right to effective judicial protection. The Higher Regional Court of Berlin indeed concluded that the EAW was admissible, the guarantees of independence in place being sufficient. In doing so, the Court elaborated on the CFR, as well as the relative case-law.

Relation between the EU Charter and ECHR

This is not applicable, as the Higher Regional Court of Berlin relied only on EU law in recognizing that the right to effective judicial protection is a general principle of EU law deriving from the constitutional traditions common to the Member States, in accordance with Art.6 TEU.

Use of Judicial Interaction technique(s)

The Higher Regional Court of Berlin concluded, following the preliminary ruling, that the request for surrender of the individual on the basis of the EAW issued by the Austrian Public Prosecutor's offices was admissible and in compliance with EU law. The Court found it necessary to send a preliminary ruling since, in an analogous case, the German Public Prosecutor was not considered

to provide the necessary guarantees of independence. The court addresses the CJEU to ultimately identify the differences between the German and Austrian legal order, thereby asking for clarification on the necessary safeguards in place in light of the fact that Framework Decision 2002/584 is based on the principle of mutual recognition, which is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Court did not use other decisions of other courts to support its decision. Therefore, there was no horizontal judicial interaction.

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

The Court engages with an assessment of the judgments of the CJEU, namely the preliminary ruling *in casu* and OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:456).

In line with the CJEU's jurisprudence, the referring Court arrived at the conclusion that EAWs issued by the public prosecutor's offices of Austria fall within the concept of EAW mandated by the Council Framework Decision 2009/299/JHA, despite the fact that those public prosecutor's offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, provided that diverse requirements are in place.

First, under Austrian law, the issue of a EAW is subject in its entirety to objective and independent review by a court which carries out a full review of the conditions for the issue of that arrest warrant and of its proportionality. The review of proportionality carried out by Austrian court relates, in the context of the endorsement of a national arrest warrant, to the effects of the deprivation of liberty alone caused by it and, in the context of the endorsement of a EAW, to the impinging on the rights of the person concerned which goes beyond the infringements of his right to freedom already examined. The court responsible for the endorsement of a EAW is required to take the effects of the surrender procedure and the transfer of the person concerned residing in a Member State other than the Republic of Austria on that person's social and family relationships particularly into account. Transmission of the EAW is only possible after the endorsement of the arrest warrant concerned by that court and, differently than German law which provides a right to remedy which takes place *a posteriori* and at the request of the individual concerned, that review systematically takes place *ex officio* before the arrest warrant produces legal effects and can be transmitted. The endorsement decision, differently than the remedy envisaged in the OG and PI judgement, is subject to appeal before the courts.

Secondly, the Court responsible for the endorsement of a EAW exercises its review independently and in full knowledge of any instructions that may have been issued in advance and adopts at the end of that review a decision that is independent of the decision of the public prosecutor's office, going beyond a mere confirmation of the legality of that decision. Therefore, the decision on the EAW by the court is autonomous and must be deemed to satisfy the requirements of objectivity and independence of the review carried out at the time of the adoption of that decision, differently than in the *OG* and *PI* ruling.

Lastly, that Court has access to the entire criminal file to which any directions or instructions in a specific case from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus being able to adopt an autonomous decision which gives EAW their final form.

Strategic use of judicial interaction technique (purpose aimed by the national court)

The Higher Regional Court of Berlin heavily relied on the case law of the CJEU to differentiate the case at stake from the *OG* and *PI* case. There the Court found that German public prosecutors' offices that are subject to specific instructions or individual orders of the executive were not independent enough to issue EAWs. The purpose *in casu* was to assess whether Austrian Public Prosecutors provide sufficient guarantees of independence or whether, similarly to the German Public prosecutor's office in the aforementioned case, they did not satisfy the requirements imposed by EU law. The Austrian system passed the test because the CJEU established that a comprehensive review of the guarantees surrounding the EAW is required by the national court before the transmission of the warrant. A different conclusion would have created frictions in the mutual recognition regimes of the EAW.

Impact on Legislation / Policy

No impact on Austrian national legislation/policy.

Notes on the national implementation of the preliminary ruling by the referring court

The Court agreed with the CJEU in concluding that it is common ground that the courts responsible for the endorsement of EAW meet the requirement of objectivity and independence and executed the EAW. Differently than in Germany, before transmission, the court reviewing the EAW will assess the conditions of the issue and its proportionality. Additionally, differently than in Germany, the endorsement decision is subject to appeal before the courts. National implementation of the present ruling, in conjunction with the *OG* and *PI*, will galvanize the debate around the controversial right of instruction of the Ministers of Justice vis-à-vis the German public prosecutors' offices.

Impact on national case law from the same Member State or other Member States

This judgement could potentially influence new legislation in Germany in relation to the system of issuance of EAWs and their endorsement by a court. This could prompt amendments to the right of instruction that the Ministers of Justice retain and changes to the role of national courts in the process of endorsement of EAWs.

Connected national caselaw / templates

See the judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices of Lübeck and Zwickau)*, C-508/18 and C-82/19 PPU, EU:C:2019:456

(Link to) full text

<https://www.juris.de/perma?d=KORE220542019>

History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Preliminary Question of the Superior State Court of Berlin, 4th criminal section, of 26/06/19 (4) 151 AuslA 106/19 (103/19) to the CJEU
 2. Preliminary Ruling by the CJEU C-489/19
 3. Judgment of the Superior State Court of Berlin, 4th criminal section, of 14/10/19 151 AuslA 106/19 (103/19) (DE), unpublished, available on request.
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