

CJEU, Joined Cases OG (Parquet de Lübeck) and PI (Parquet de Zwickau)

C508/18 and C82/19 PPU, 27/05/2019

Member State

 Germany  Ireland

Topic

Mutual Trust, Independence of the Public Prosecutor, EAW

Deciding Court Original Language

Grand Chamber, CJEU

Deciding Court English translation

Grand Chamber, CJEU

Registration N

Cases C508/18 and C82/19 PPU

Date Decision

27/05/2019

ECLI (if available)

ECLI:EU:C:2019:456

National Follow Up Of (when relevant)

Not Applicable.

EU legal sources and CJEU jurisprudence

Primary Law

- Article 6 of the Charter

Secondary Law

- Article 1 Framework Decision 2002/584
- Article 3, 4, 4a Framework Decision 2002/584
- Article 6 Framework Decision 2002/584
- Art 107 Rules of Procedure of the Court of Justice

CJEU judgments in:

- *LM* (ECLI:EU:C:2018:586)
 - *Poltorak*, (ECLI:EU:C:2016:858)
 - *Kovalkovas* (ECLI:EU:C:2016:861)
 - *Ardic* (ECLI:EU:C:2017:1026)
 - *B.* (ECLI:EU:C:2010:626)
 - *Bob-Dogji* ECLI:EU:C:2016:385
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ECtHR Jurisprudence

Not applicable.

Subject Matter

Requests for a preliminary ruling concerning the interpretation of Article 6(1) of the EAW Decision made in proceedings in Ireland concerning the execution of two EAWs issued respectively in Case C508/18 on 13 May 2016 by the Office of the Public Prosecutor at the Regional Court, Lübeck, Germany for the purposes of the prosecution of OG, and in Case C82/19 PPU on 15 March 2018 by the Public Prosecutor's Office in Zwickau for the purposes of the prosecution of PI.

Legal issue(s)

Independence of the German Public Prosecutors

The issue revolved around the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584 and whether it must be interpreted as including the public prosecutors' offices of a Member State which are responsible for the prosecution of criminal offences and are subordinate to a body of the executive of that Member State, such as a Minister

for Justice, and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue a EAW.

Request for expedited/PPU procedures

The referring court requested that Case C508/18 be dealt with pursuant to the expedited procedure under Article 105(1) of the Rules of Procedure of the Court. That request was dismissed by the President of the Court on 20 September 2018. By decision of the President of the Court, Case C508/18 was given priority over others.

Interim Relief

No

National Law Sources

Irish law:

- Section 20 of the EAW act

German law:

- Paragraphs 146, 147 of the Law on the Judicial System; 'the GVG'
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Facts of the case

OG is a Lithuanian national residing in Ireland, whose surrender was sought pursuant to a EAW issued by the Public Prosecutor's Office in Lübeck for the prosecution of the crime of murder, grievous bodily injury. OG challenged the validity of the EAW in front of an Irish court, alleging that the Prosecutor's Office is not a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584 on the basis that under German law the public prosecutor's office does not enjoy the autonomous or independent status of a court of law, but is subject to an administrative hierarchy headed by the Minister for Justice, so that there is a risk of political involvement in surrender proceedings. Furthermore, OG claimed that the public prosecutor's office is not a judicial authority with competence to order detention or arrest of any person except in exceptional circumstances, as only a judge or court has those powers. After having sought further information from Lübeck's public prosecutor, the Irish High Court rejected OG's submission that the Public Prosecutor's Office in Lübeck is not a 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584. In an appeal brought before the Court of Appeal (Ireland), the judgment of the High Court was upheld. Uncertain about the guarantees of independence of the German public prosecutor, the Irish Supreme Court stayed the proceedings and referred diverse questions to the CJEU.

Secondly, PI, a Romanian national, was the subject of a EAW issued by the Public Prosecutor's Office in Zwickau (Germany) for the prosecution of a criminal offence identified as 'organised or armed robbery'. That arrest warrant was endorsed for execution by the referring court, the High Court, in September 2018, leading to PI's arrest in October 2018. The referring court stated that it is confronted with the same difficulties raised by the Supreme Court in the OG case above. Similarly to the

Supreme Court, the High Court wished to ascertain whether the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as including the public prosecutors' offices of an MS which are responsible for the prosecution of criminal offences and are subordinate to a body of the executive of that MS (*in casu* the Minister for Justice) and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue a EAW.

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

The Court primarily based its reasoning on its earlier jurisprudence. After recognising the importance of the principle of mutual trust, in particular in the area of European criminal law, and assessing the implementation of the principle of mutual recognition in the EAW framework, the Court pointed out that it follows from Art. 1(1) of the framework decision that an arrest warrant is a 'judicial decision', which requires that it be issued by a 'judicial authority' within the meaning of Article 6(1) of that framework decision.

The Court then highlighted the principle of procedural autonomy in relation to the MS's competence to designate the judicial authority issuing EAWs, which however requires an autonomous and uniform interpretation throughout the Union. In fact, it follows from the case law that the concept of judicial authority includes MS authorities which, although not necessarily judges or courts, participate in the administration of national criminal justice. The Court continued, stressing the teleological interpretation of the principle of judicial cooperation as enshrined in Article 82(1)(d) TFEU and recital 5 of the Framework Decision, thereby connecting it to the objectives set for the AFSJ in accordance with mutual recognition. Additionally, the CJEU underlined that the issuing of a European arrest warrant may have two distinct aims, as laid down in Article 1(1) of Framework Decision 2002/584. It may be issued either for the purposes of conducting a criminal prosecution in the issuing MS or for the purposes of executing a custodial sentence or detention order in that MS. It then concluded that *in casu*, it is clear from the information in the case file before the Court that, in Germany, public prosecutors' offices have an essential role in the conduct of criminal proceedings and can be regarded as participating in the administration of criminal justice in Germany.

Secondly, the Court went on assessing the requirements of independence of the public prosecutor in light of its subordination to the executive.

The CJEU started by explaining that the aims of the Framework Decision are to introduce a simplified system of surrender directly between judicial authorities designed to replace a traditional system of cooperation between sovereign States — which involves the intervention and

assessment of the executive — in order to ensure the free circulation of court decisions in criminal matters within the AFSJ. Thus, when an EAW is issued with the aim to arrest a requested person, that person must have already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial authorities of the issuing MS to ensure, in accordance with the applicable provisions of national law. The Court described this as a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person: In addition to the judicial protection provided at the first level when issuing the national arrest warrant there shall also be protection at the second level when the EAW is issued. Since the EAW impinges on the right to liberty of the person concerned, as mandated by Article 6 of the Charter of Fundamental Rights of the European Union, 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. Thus, where an MS confers the competence to issue a EAW on an authority other than a judicial one, that authority must itself meet those requirements. The latter are satisfied where the decision to issue a EAW is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584. The second level of protection mandates that the judicial authority competent to issue a European arrest warrant by virtue of domestic law must review, in particular, observance of the conditions necessary for the issuing of the European arrest warrant and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant. It is for the 'issuing judicial authority' to guarantee this second level of protection. This authority must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not ultimately with the executive.

The CJEU thus affirmed that the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of its responsibilities which are inherent in the issuing of EAW. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive. Additionally, where domestic law grants the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

In casu, although the German public prosecutors are required to act objectively, they are subject to the external power of the minister of justice which issues instruction with regard to the public prosecutors' offices. When assessing the safeguards in place, such as the application of the principle of legality to all the public prosecutors' actions, the CJEU made clear that such safeguards, assuming that their existence were to be established, cannot wholly rule out the

possibility in all circumstances, that a decision of a public prosecutor's office, such as *in casu*, to issue a EAW may, in a given case, be subject to an instruction from the minister for justice of the relevant *Land*.

When dealing with the substance of the case, the CJEU clarified that the existence of the principle of legality is not, in itself, capable of preventing the minister for justice of a *Land* from influencing the discretion enjoyed by the public prosecutors' offices of that *Land* in deciding to issue a EAW. Secondly, it outlined that although some instructions are given in writing, it cannot be ruled out that such instructions may be given orally. Lastly, *in casu*, the fact remains that that safeguard in place does not appear to cover all cases, not being enacted in statutory form.

Where the executive may influence a public prosecutor's office in such a way in a specific case signifies that the guarantees of independence cannot be ensured. Although the decision to issue a EAW can be challenged by the individual concerned, the effect of that legal remedy is to grant a possibility of review by a court *a posteriori*, which means that any instruction by the minister of justice remains in any case permitted by German law. Thus, it follows that in so far as the public prosecutors' offices at issue in the main proceedings are exposed to the risk of being influenced by the executive in their decision to issue a EAW, those public prosecutors' offices do not appear to meet one of the requirements of being regarded as an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, namely the requirement that it be guaranteed that they act independently in issuing such an arrest warrant. The Court concluded that where public prosecutors 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 adoption of a decision to issue a EAW, they do not fall under the concept of an 'issuing judicial authority'.

Relation of the case to the EU Charter

The EU Charter was invoked as the relevant parameter for the right to liberty. Indeed, the CJEU clarified that in case of a measure, such as the issuing of a EAW, which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter, protection of this right requires that a decision meeting the requirements inherent in effective judicial protection (Art.47 Charter) should be adopted, at least, at one of the two levels of that protection.

Relation between the EU Charter and ECHR

The CJEU based its reasoning on the right to liberty and consequent effective judicial protection on the Charter alone and it did not explicitly mention the ECHR or the ECtHR's jurisprudence.

Use of Judicial Interaction technique(s)

The CJEU assessed the guarantees of independence attached to the decision of the German public prosecutor in light of its own jurisprudence and found it to be non-compliant with EU law.

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

The CJEU used numerous own judgements in the area of European criminal law to substantiate its reasoning, in particular *Poltorak* (ECLI:EU:C:2016:858) and *Kovalkovas* (ECLI:EU:C:2016:861) to establish the meaning of ‘issuing judicial authority’ and provide clarification to various concepts laid out in Framework Decision 2002/584. To outline the application of the principles of mutual trust and mutual recognition in the AFSJ, the CJEU relied on *LM* (ECLI:EU:C:2018:586), thereby complementing it with *Ardic* (ECLI:EU:C:2017:1026). The *B* (ECLI:EU:C:2010:626) judgement has been utilised to outline the aims of issuing a EAW. The importance of procedural safeguards and the dual level of protection in the EAW framework has been exemplified by the *Bob-Dogi* ruling (ECLI:EU:C:2016:385).

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

The CJEU did not use national judgements to substantiate its reasoning, therefore no vertical judicial interaction was present.

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

The Court heavily relied on its case law to assess the compatibility of national law with EU law. The purpose was to examine whether the German system of issuing EAWs by public prosecutors’ offices was in compliance of EU law.

Impact on Legislation / Policy

It is probable that this ruling will have a significant impact on German legislation/policy. According to the judgement, there would need to be a transformation in the practice of the EAW, thereby changing the degree of autonomy of the prosecution and incorporating a judicial decision to the process preceding the issuance of a EAW. This would signify that the judiciary would take over more work in this regard.

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

Not applicable.

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

Not applicable.

Connected national caselaw / templates

See:

CJEU:

- Joined Cases C-566/19 PPU and C-626/19 PPU (*French Public Prosecutor's Office*)
- Case C-509/18 PF (*Prosecutor General of Lithuania*)
- Case C-510/19 (*Openbaar Ministerie*)
- Case C-627/19 PPU (*Belgian Public Prosecutor's Office*)
- Case C-625/19 PPU (*Swedish Prosecution Authority*)

Templates:

- DE_2019_HigherRegionalCourtBerlin_(4)151AuslA106-19(103-19)_Independence&Objectivity_Court_endorsing_EAW

(Link to) full text

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=214466&pageIndex=0&doclang=EN&mo>
