

## Court of Justice of the European Union, Case C-268/17 AY, Fifth Chamber, 25 July 2018

### Member State

 Croatia  Hungary

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### Topic

mutual trust

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### Sector

European Arrest Warrant, Use of the Preliminary Reference Procedure

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### Deciding Court Original Language

Court of Justice of the European Union

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### Deciding Court English translation

Court of Justice of the European Union

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### Registration N

Case C-268/17

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### Date Decision

25 July 2018

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### ECLI (if available)

ECLI:EU:C:2018:602

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### EU legal sources and CJEU jurisprudence

Articles 1(2) and 3(2), and 4(3) of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA); Article 50 of the Charter of Fundamental Rights of the European Union

The CJEU referred to a number of its own previous decisions: *Sleutjes* C-278/16; *Piotrowski* C-367/16; *Tupikas* C-270/17 PPU; *Kossowski* C-486/14; *Mantello* C-261/09; *M* C-398/12; *Gasparini and Others* C-467/04

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## Subject Matter

Hungarian authorities refused to execute several EAWs issued by the Croatian authorities regarding criminal proceedings against AY. In 2017, the Zagreb County Court submitted a request for a preliminary ruling to the CJEU for the interpretation of the grounds for refusal determined by the EAW Framework Decision.

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## Legal issue(s)

refusal to execute EAW, the meaning of ne bis in idem under EU law

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## Request for expedited/PPU procedures

YES - the issuing authority requested the reference to be dealt with under an urgent procedure on the ground that AY might be arrested, and his pre-trial detention was ordered. The request was denied by the CJEU, but it ordered the priority treatment of the case.

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## Facts of the case

In 2011, Croatian authorities started an investigation against AY, a Hungarian national and the chairman and CEO of a Hungarian oil company, for allegedly paying a large sum of money to a high-ranking Croatian politician to sign a contract. Within the framework of international legal aid, they requested Hungary to hear AY as a suspect and serve him with a summons. Hungary refused to provide international legal assistance to the Croatian authorities by referring to Hungary's national interest, so the investigation was halted in Croatia. However, the Hungarian Prosecutor General, based on the communicated information, launched an investigation in 2011. This was terminated by the competent authority (Hungarian National Bureau of Investigation) in 2012 on the ground that according to Hungarian law, the committed act did not constitute a criminal offence. In the Hungarian proceedings, the investigation was carried out against an unknown person, and AY was only interviewed as a witness. In October 2013, the Croatian anti-corruption office issued an EAW against AY, which the Budapest-Capital Regional Court (Fővárosi Törvényszék) refused to execute on the ground that a criminal procedure was brought for the same act in Hungary. In December 2015, after AY was indicted in Croatia, a new EAW was issued against him, but the EAW was never executed by the Hungarian court. In January 2017, the same EAW was again sent to Hungary with the clarification that the first EAW (in 2013) was issued by the prosecution service in pre-trial proceedings; thereby, the circumstances in the issuing Member State had changed. However, the 60-day deadline expired without a response, and the referring court turned to Eurojust. The Hungarian authorities argued that they were not obliged to execute the EAW: there were no legal grounds to arrest AY or reopen the proceedings for the execution of the 2015 EAW. The Zagreb County Court submitted 5 questions to the CJEU for a preliminary ruling regarding the proper interpretation of the Framework Decision 2002/584. Questions 1 and 2 concerned the interpretation of Article 4(3): 1. the issue of whether decisions about not to prosecute for an offence or halt the proceedings must relate only to the offence on which the EAW is based or also to the requested person as a suspect or accused; and (2) whether the execution of an EAW can be refused if the requested person was only a witness in these proceedings. Question 3 was about whether Article 3(2) could be invoked as a ground for refusal if the requested person was only a witness and not an accused or suspect in the proceedings which were terminated. Question 4 concerned the link between the mandatory and optional grounds for refusal laid down in Article 3(2) and Article 4 (3), respectively, with regard to the meaning of the following conditions: the requested person was "finally judged" (mandatory ground) or "a final judgment" was passed upon the requested person which prevents further proceedings (optional ground).

Question 5 related to the interpretation of Article 1(2) and the issue of whether the executing Member State must decide on any EAW communicated to it.

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

The first issue was whether the questions were admissible or not. The CJEU found all 5 questions admissible, despite AY's argument that the questions raised were irrelevant for the purposes of the main proceedings in which the referring court had to decide on the charges against him. The CJEU argued that two sets of proceedings were pending before the referring court: (1) criminal proceedings in absentia of AY and (2) proceedings regarding the issue of an EAW, and the request was made within the latter proceedings. The CJEU held that the relevance of the questions could not be questioned on the ground that they concerned the obligations of the executing authorities, while the request for the interpretation of EU law was made by the issuing authority. The person subject to the EAW might be arrested, which entails a restriction of his individual freedom, and the primary responsibility for guaranteeing fundamental rights in EAW proceedings lies with the issuing authority. Furthermore, the referring court had to decide whether to maintain the EAW in force or withdraw it, which depended on the interpretation of the Framework Decision, namely on the question of whether the executing authority was authorized or was obliged not to decide on the EAW or to refuse to execute it. (Interestingly, the Advocate General took the opposite view and argued that the CJEU lacked jurisdiction to answer Questions 1 to 4 as they were only relevant to the Hungarian authorities. AG Szpunar also noted that if the issuing Member State seeks to assess if the executing authority has properly applied the national law, in the present case regarding Articles 3(2) or 4(3) of the Framework Decision, "it moves dangerously close to a breach of that mutual trust".) The CJEU first answered the fifth question (Question 5) on the interpretation of Article 1(2). The CJEU argued that Member States are generally required to execute any EAW on the basis of mutual recognition, and as a general rule, refusal is possible only on the basis of the exhaustive list provided by the Framework Decision in Articles 3, 4 and 4a. Consequently, the executing authority which does not reply and communicate any decision to the issuing authority would breach its obligations stemming from the Framework Decision. As a result, Article 1(2) requires the executing authority to adopt a decision on any EAW, even if an executing authority made a ruling on a previous EAW regarding the same person and the same act, but the second EAW was issued based on the indictment of the respective person in the issuing Member State. The CJEU then jointly examined the first four questions (Questions 1 to 4) requiring the interpretation of Article 3(2) and Article 4(3) of the Framework Decision, which set out the grounds for the mandatory or optional refusal of the execution of an EAW. The CJEU had to answer the question of whether the Hungarian authority's refusal was in compliance with any of these grounds provided by the Framework Decision. Regarding Article 3(2), which sets the grounds for obligatory non-execution of EAWs, the CJEU argued that the respective provision requires the refusal of the execution of the EAW if the same person has already been "finally judged" regarding the same act. The CJEU stressed that this provision reflects the principle of *ne bis in idem*, also guaranteed by Article 50 of the EU Charter, which entails that no one can be tried or punished twice in criminal proceedings for the same acts. The term "finally judged" covers not only "judgments" in a strict sense but also final decisions on discontinuing criminal proceedings made by criminal justice authorities other than courts. A requested person is finally judged for the same act if further prosecution is finally barred or the person is finally acquitted of committing the alleged offence. *Ne bis idem* also requires previous criminal proceedings against a requested person. However, the competent Hungarian authorities conducted an investigation against an unknown person, so AY was not a suspect or accused of the proceedings; he was interviewed only as a witness. As no criminal proceedings were brought against him in Hungary, he could not be finally judged in the executed Member State within the

meaning of Article 3(2), so this could not be invoked as grounds for refusing the EAW. Article 4(3) determines three optional grounds for refusing the execution of an EAW: when judicial authorities (1) have decided not to prosecute for the offence, (2) decided to halt proceedings, or (3) delivered a final judgment which prevents further proceedings regarding the same act. The CJEU examined the three legal grounds separately. The CJEU found the first ground irrelevant in light of the facts of the case and argued that the conditions for applying the third ground were not fulfilled either. As to the second ground, the CJEU stressed that refusal is an exception, so the legal grounds for it must be interpreted strictly. While the Framework Decision states that the execution of the EAW may be refused if judicial authorities have decided to halt the proceedings "regarding the offence on which the EAW is based", the EAW is issued against a particular person and serves the purpose of the prevention and combating of crime within the scope of the European area of freedom, security and justice. As a result, if the identity of the person under criminal proceedings would be irrelevant when the refusal of the EAW's execution is at stake, the obligation to execute EAWs could be easily circumvented by the Member States. This understanding was also advocated by the Commission in its observations and was supported by the original proposal for the Framework Decision made by the Commission in 2001. The CJEU concluded that the prosecutor's decision about terminating the investigation opened against an unknown person could not be relied on for refusing the EAW's execution under Articles 3(2) and 4(3) of the Framework Decision.

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#### Relation of the case to the EU Charter

The CJEU invoked Article 50 of the EU Charter, which declares the "right not to be tried or punished twice in criminal proceedings for the same criminal offence" in order to determine the meaning of Article 3(2) of the Framework Decision, therefore the Charter was referred to as a supporting argument.

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#### Use of Judicial Interaction technique(s) preliminary reference

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

In the present case, the Zagreb County Court turned to the CJEU, presumably to force the Hungarian court to cooperate and make a decision on the new EAWs. It also sought the clarification of Hungary's rights and obligations under Articles 3(2) and 4(3) of the Framework Decision, thereby seeking the CJEU's review of the Hungarian decision about the refusal of the surrender.

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#### Impact on Legislation / Policy

The present case concerns high-profile criminal proceedings brought by the Croatian authorities against Zsolt Hernádi, chief executive of the MOL, a Budapest-based multinational energy company established in Hungary in 1957. He was accused of offering 10 million EUR to Ivo Sanader, the then Prime Minister of Croatia, to make MOL the largest shareholder and acquire decision-making powers in INA, a Croatian oil and gas company. In 2019, the Zagreb County Court found Mr. Hernádi guilty of bribery in absentia, and the judgment was upheld by the Croatian Supreme Court in 2021. In 2013, when the first EAW was issued against Hungarian, the competent Hungarian court (Budapest-Capital Regional Court) refused to execute the EAW on the ground that criminal proceedings were opened for the same act, which then were terminated by the authorities. The criminal case against Hernádi was opened in Hungary after a shareholder of

MOL submitted a motion as a private prosecutor by claiming that Hernádi had failed to inform the shareholders about the deal, thereby misleading them and causing harm not only by allegedly paying 5 million EUR for Ivo Sanader but also by being responsible for the fall in the share price which occurred when the criminal proceedings made the news. In 2014, the Budapest-Capital Regional Court delivered its judgment in which it held that no bribery took place, so it terminated the proceedings in this regard and acquitted Hernádi of other charges (fraud and misappropriation of funds). On appeal, the court found that the private prosecution should have been dismissed as the private prosecutor, not having a victim status regarding the alleged bribery, had no legal standing at all to start the proceedings. Therefore, the court of first instance could not have heard the case on the merits either. In 2018, when the Budapest-Capital Regional Court again decided not to execute the EAW (see below), it relied on the abovementioned decisions made in private prosecution as secondary grounds for the EAW's refusal.

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#### [Notes on the national implementation of the preliminary ruling by the referring court](#)

In August 2018, after the delivery of the CJEU's ruling, the Budapest-Capital Regional Court again refused to execute the EAW. The prosecution office and Hernádi's defence lawyer also argued for the refusal of the execution of the EAW. It is only a press release concerning the decision that is available on the respective court's website. It states that contrary to the argument of the prosecution office, the prosecution of the offence was not time-barred as the limitation period was interrupted by the issuance of a new EAW. However, the court found that there was a risk that in case of the defendant's surrender, his right to a fair and impartial hearing would not be ensured. These risks are confirmed by the decisions of the Croatian Constitutional Court and the UNCITRAL (Geneva Arbitration Court). Furthermore, the Budapest-Capital Regional Court noted that in 2014, Hungarian courts had already delivered a judgment against Hernádi on the same facts in private prosecution against international bribery. These proceedings against Hernádi were terminated by the court, and the decision became final on appeal. While the press release made reference to the decisions of the Croatian Constitutional Court and the UNCITRAL Tribunal, it failed to explore their relevance for the refusal of the EAW's execution. (1) In 2015, the Croatian Constitutional Court annulled the verdicts sentencing Sanader to imprisonment (at first instance to 10 years, which was reduced by the Supreme Court to 8 and a half years) and ordered the retrial of the case on the ground that Sanader's right to a fair trial was violated due to procedural errors in the main proceedings. (2) In arbitration proceedings under UNCITRAL, Croatia challenged the validity of the Shareholders Agreement and its 2009 amendment made between Croatia and MOL in relation to INA, primarily relying on the alleged bribery. In December 2016, UNCITRAL rejected Croatia's all claims, including the one concerning bribery. "Having considered most carefully all of Croatia's evidence and submissions on the bribery issue, which has been presented in a most painstaking and comprehensive way, the Tribunal has come to the confident conclusion that Croatia has failed to establish that MOL did in fact bribe Dr Sanader." (See para 333 of the Final Award in PCA Case No. 2014-15: <https://www.italaw.com/sites/default/files/case-documents/italaw94016.pdf> ) The UNCITRAL Tribunal also noted that the judge in the Sanader trial was obviously biased. The Hungarian decision on the refusal of the EAW was made shortly after the CJEU delivered its landmark judgment in the LM case (C-216/18 PPU), which addressed a very similar issue, namely under what conditions concerns about the respect for the right to a fair trial in the issuing Member State can lead to the refusal of the requested person's surrender. As the Hungarian decision is not available in the official database, we can only suppose that the judge referred to the LM case in her reasoning.

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[\(Link to\) full text](#)

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

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