

Judicial Authority and Judicial Decision

Agenda



**The concept of judicial
authority in the
framework decision**



**The concept of judicial
authority in various case
law**



**Requirements of
independence & right to
effective judicial
protection**

Framework Decision 2002/584/JHA on the European arrest warrant (FD EAW)

Recital (5):

“The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between **judicial authorities.**”

Art. 1 (1):

“The European arrest warrant is a **judicial decision** issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”

Art. 6(1):

” The issuing **judicial authority** shall be the **judicial authority** of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State.

Framework Decision 2002/584/JHA on the European arrest warrant (FD EAW)

► Concept of **issuing judicial authority**

Art. 6(1):

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Essential question:

What requirements must be fulfilled to be considered an “issuing judicial authority” within the meaning of Art. 6(1) FD EAW?

Background of the cases:

CJEU Decisions of 10 November 2016 in Cases C-452/16 PPU (*Poltorak*), C-477/16 PPU (*Kovalkovas*) and C-453/16 (*Özçelik*)

Autonomous and uniform interpretation (meaning and scope cannot be left to the assessment of each MS).

1. Participation in the administration of justice;
2. Authority must be in a position to ensure that “decisions relating to EAWs are attended by all the guarantees appropriate for decision of such a kind, *inter alia* those resulting from the fundamental rights”, and thus that “the entire surrender procedure between MS is carried out under judicial supervision.”

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Member States may designate, in their national law, the ‘judicial authority’ with the competence to issue a EAW

Paragraph 30 and 31

The law of the issuing state designates the judicial authority with the competence to issue EAWs but does not extend to the definition of the term ‘issuing judicial authority’ itself → this term requires an autonomous and uniform interpretation throughout the EU

Case C-452/16 PPU Poltorak

- ! Since a EAW is a judicial decision, only EAWs validly issued by a judicial authority should be executed

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Case C-452/16 PPU Poltorak

The concept within the meaning of Article 6(1) of the FD can include authorities of a MS which, although not necessarily judges or courts, **participate in the administration of criminal justice**

Paragraph 33

- Does not include police or an organ of the executive
- Public prosecutors will qualify as an issuing judicial authority if two conditions are met

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► Public prosecutors will qualify as an issuing judicial authority if two conditions are met

- 1 they must **administer or participate in the administration of justice**, which should be understood broadly to include prosecuting persons suspected of committing a criminal offence so that they may be brought before a court; and
- 2 they must be in a **position to act independently**, in particular with respect to the executive

► German System

► German **Prosecutor** as 'issuing judicial authority'

Joined Cases C-508/18 (OG) and C-82/19 PPU (PI)

Defendants whose surrender from Ireland had been requested by German prosecution services argued that, in fact, no “judicial authority” within the meaning of Art. 6(1) FD EAW and previous CJEU case law was involved in the issuance of the European Arrest Warrants, because:

- German public prosecution offices are only entitled to execute a national arrest warrant issued by a judge or court;
- German public prosecution offices do not enjoy an autonomous and independent status but are subject to an administrative hierarchy headed by the Minister for Justice.



“whether the concept of an ‘issuing judicial authority’, within the meaning of Art. 6(1) [FD 2002/584], 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 European arrest warrant.”

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? “whether the concept of an ‘issuing judicial authority’, within the meaning of Art. 6(1) [FD 2002/584], 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 European arrest warrant.”

A Principle of procedural autonomy

→ MS may designate in their national law, the judicial authority competent to issue EAWs

However, the wording, context and objective of the FD EAW must be considered

► The concept must cumulatively meet two criteria!

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- ❑ The authority participates in the administration of criminal justice in an EU Member State (as distinct from, inter alia, ministries or police services, which are part of the executive);
- ❑ The authority responsible for issuing an EAW must act independently in the execution of its functions (even if the EAW is based on a national arrest warrant issued by a judge or court).

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A Application to the concrete cases

- ❑ The authority participates in the **administration of criminal justice** in an EU Member State (as distinct from, inter alia, ministries or police services, which are part of the executive); = fulfilled
- ❑ The authority responsible for issuing an EAW must act independently in the execution of its functions (even if the EAW is based on a national arrest warrant issued by a judge or court) = the EAW system involves a dual level of protection

level 1 judicial protection for a national decision, such as a national arrest warrant

level 2 protection when an EAW is issued: the judicial authority *"must review, in particular, observance of the conditions necessary for the issuing of the EAW and examine the proportionality of the EAW."*

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A Application to the concrete cases

- level 1 judicial protection for a national decision, such as a national arrest warrant
- level 2 protection when an EAW is issued: the judicial authority *“must review, in particular, observance of the conditions necessary for the issuing of the EAW and examine the proportionality of the EAW.”*

As a result, the MS must guarantee that the “issuing judicial authority,” meets the following capacities:

- ☐ Exercising its responsibilities objectively;
- ☐ Considering all incriminatory and exculpatory evidence;
- ☐ Not being exposed to the risk that its decision-making power is subject to external directions or instructions, from the executive.

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A Application to the concrete cases

- “It is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive.”
- if the authority to which MS confers the competence to issue EAWs is not itself a court, the decision to issue an EAW – and the proportionality of such decision – must be subject to court proceedings, “which meet in full the requirements inherent in effective judicial protection.”
- Abstract existence of ministers’ powers to politically influence decisions of public prosecutors suffices

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Conclusion

+ First criteria is fulfilled

+ Second criterion (independence) not fulfilled in case of German prosecution services.

The fact that the Minister for Justice has an 'external' power to issue instructions in respect of specific cases enabled that minister to have a **direct influence** on a decision to issue or not to issue a EAW meant that the public prosecutors' offices fell outside of the meaning of 'issuing judicial authority in Article 6(1) Framework Decision 2002/584



This was **despite the existence of legal safeguards** and even though this power had not been exercised

The existence of a legal remedy did not in itself protect public prosecutors' offices from the risk that their decisions may be the subject of an instruction, in a specific case, from the minister for justice in connection with the issuing of a EAW

▶ Lithuanian System

▶ Lithuanian **Prosecutor-General** as 'issuing judicial authority'

Case C-509/18 (PF)

- EAW issued for prosecution by Prosecutor General (most senior public prosecutor in Lithuania → independent both of the executive and of the judiciary)
- PF challenged the validity of that EAW, on the ground, inter alia, that the Prosecutor General of Lithuania is not a 'judicial authority'
- Irish Supreme Court sends question to the CJEU

? Can the Prosecutor General of Lithuania be considered an “issuing judicial authority”? Can only judges/courts issue European Arrest Warrants

A According to Advocate General *Campos Sánchez-Bordona*, the term “issuing judicial authority” does not include the institution of the Public Prosecutor’s Office. Deprivation of liberty can only be allowed by a court *stricto sensu*. Judicial independence is different from “independence of an authority”.

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The concept of an “issuing judicial authority” (Art. 6(1) FD EAW) includes the Prosecutor General of a MS if:

- ☐ He/She is institutionally independent from the judiciary;
- ☐ He/She is responsible for the conduct of criminal prosecutions;
- ☐ Whose legal position, in that MS, guarantees independence from the executive in connection with issuing EAWs;
- ☐ The decision to issue an EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.

▶ Lithuanian System

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Case C-509/18 (PF)

- A**
1. **Prosecutor General has an essential role** in the conduct of criminal proceedings → participates in the administration of criminal justice
 2. EAW **entails a dual level of protection** of procedural and fundamental rights: "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: judicial 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" (**para 46**) → if EAW not issued by a judge, the NAW must meet requirements

Judicial authority competent to issue EAW must examine observance of conditions for issuing EAW including **proportionality**

PF must verify requirements necessary to order the EAW are met

Judicial authority must be capable of exercising its responsibilities objectively, considering all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, from the executive, such that it is beyond doubt that the decision to issue a EAW lies with that authority and not, ultimately, with the executive

Prosecutors have the benefit of independence conferred by the Constitution guaranteeing freedom of external influence from the executive

CJEU left it to the referring court to verify also whether a decision of that prosecutor may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection

▶ Austrian System

▶ Austrian **Public Prosecutor** as 'issuing judicial authority'

Case C-489/19 PPU NJ

- EAW issued for prosecution
- follow-up question to the ruling of the CJEU in OG and PI

? Can a public prosecutor who is subject to directions or instructions in a specific case from the executive (here: the Austrian Federal Minister for Justice), but whose decisions to issue EAWs need the endorsement of a court, be considered an “issuing judicial authority”?

A The concept of an “issuing judicial authority” (Art. 6(1) FD EAW) is fulfilled if:

- ☐ The court's review of the public prosecutor's decision is *ex officio*, independent, and objective;
- ☐ The court has access to the entire criminal file to which any specific directions or instructions from the executive are added;
- ☐ The court is able to review the conditions of issue and the proportionality of the arrest warrants, thus adopting an autonomous decision which gives them their final form.

▶ Austrian System

- ▶ Austrian **Public Prosecutor** as 'issuing judicial authority'

Case C-489/19 PPU NJ

- A** Prosecutor issuing EAW **not independent**: the Minister for Justice can issue instructions in a specific case

But the **decision to issue an EAW** satisfies the validity requirements because the EAW is subject to *ex officio* judicial review before the EAW produces any legal effects:

- ✓ Austrian law provides that both the decisions to issue a national arrest warrant and a EAW **must be endorsed**, in order that it may be transmitted, by a court which is to carry out, in that regard, a review of the conditions of the issue and its proportionality
- ✓ **Any instructions from the executive must be in writing and added to the criminal file** which is transmitted in full to the court responsible for the endorsement

▶ Austrian System

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Case C-489/19 PPU NJ

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The review of **proportionality** carried out by that 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
includes the effects of the surrender procedure and the transfer of the person concerned residing in a Member State other than Austria on that person's social and family relationships

- ✓ Court may order **additional investigations**: not bound by prosecutor
- ✓ **Right to appeal**: the endorsement decision is subject to appeal before the court

▶ French System

▶ French **Public Prosecutor** as 'issuing judicial authority'

Case C-489/19 PPU NJ

- EAWs issued by the French public prosecutors, seeking the surrender of JR from Luxembourg and YC from the Netherlands for prosecution
- follow-up question to the ruling of the CJEU in OG / PI and PF

? Can a public prosecutor who is subject to directions or instructions in a specific case from the executive (here: the Austrian Federal Minister for Justice), but whose decisions to issue EAWs need the endorsement of a court, be considered an “issuing judicial authority”?

- The Ministry of Justice (here: France) cannot direct instructions in specific cases but issue general instructions on criminal justice policy;
- The issuing French public prosecutor is subordinate to his/her hierarchical superiors, and is therefore obliged to follow instructions/directions;
- He/she is, at the same time, the competent prosecuting body and the authority that controls the conditions for issuing EAWs and their proportionality, which raises doubts on impartiality;
- There is no separate legal remedy for the person concerned against the decision to issue an EAW and its proportionality. Instead, the public prosecutors rely on the decision of the (investigative) judge who examines the lawfulness of the issuance of the national arrest warrant?

► French System

- French **Public Prosecutor** as 'issuing judicial authority'

Case C-489/19 PPU NJ

A

Does the French Public Prosecutor have an independent status?

For independence it does not matter that

- General instructions from the Ministry of Justice can be given;
- Prosecutors are subject to internal instructions by hierarchical superiors;
- Prosecutors at the same time conduct criminal prosecutions and issue EAWs.

The requirements for the established protection at the two layers are met if proportionality of the decision of the public prosecutor's office to issue an EAW is judicially reviewed before, or practically at the same time as that decision is adopted, or even subsequently. It is also fine if such an assessment is made in advance by the court adopting the national decision that may subsequently constitute the basis of the EAW.

Is the necessary effective (dual) protection afforded?

► Belgian System

► Belgian **Prosecutor** as 'issuing judicial authority'

Case C-627/19 PPU, ZB

- EAW was issued by prosecutor for the purposes of serving a sentence
- Follow up question previous CJEU rulings



Must there be a possibility of instituting court proceedings against the decision to issue an EAW which meet in full the requirements inherent in effective judicial protection, in particular the proportionality of the decision, if the EAW was issued for the purpose of enforcing a custodial sentence?



Separate judicial review against issuance of EAW not needed. Effective judicial protection for the person requested based on an EAW issued for the purposes of executing a sentence, is carried out by the enforceable judgment.

► Belgian System

► Belgian **Prosecutor** as 'issuing judicial authority'

Case C-489/19 PPU NJ

A

The independence of Belgian prosecutors in carrying out individual investigations and prosecutions is guaranteed by the **Belgian Constitution**: while the Minister of Justice can draw up directives in the field of criminal policy, these do not constitute injunctions or instructions aimed at a specific case

The requirements of independence differ where the EAW is issued for the purposes of serving a sentence rather than prosecution: the existence of a previous judicial procedure ruling on the guilt of the requested person allows the executing judicial authority to presume that the decision to issue a EAW for the purposes of execution of a sentence results from a national procedure within the framework of which the person subject to an enforceable judgment has benefited from all the guarantees specific to the adoption of this type of decision, in particular those resulting from basic rights and fundamental legal principles

► Dutch System

► Dutch **Prosecutor** as 'issuing judicial authority'

Case C-510/19 (AZ and others)

The Dutch public prosecutor's office (Openbaar Ministerie) gave consent to an extended prosecution of offences not recorded in the initial EAW submitted by the Belgian authorities.



Must the concept of “issuing judicial authority” be transferred to “executing judicial authority” (Art. 6(2) FD EAW)?



Yes, concept is transferable.

- Just as the issue of an EAW, also the execution is capable of prejudicing the liberty of the requested person.
- Unlike the procedure for the issuing of an EAW, there is no dual level of protection of fundamental rights if the executing judicial authority intervenes.

Since the Dutch public prosecutor may receive instructions from the Dutch Minister of Justice in specific cases, he/she does not constitute an “executing judicial authority.” Therefore, the consent given by the Netherlands to disapply the speciality rule is void.