The AY Case – Construing EAW ne bis in idem within the Boundaries of the Preliminary Ruling Reference

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ABSTRACT

This article analyses and comments on the opinion of the Advocate General and the ECJ judgment in case C-268/17 (European arrest warrant against AY). Interestingly, the case has remained somewhat unnoticed, the literature on it being scarce. However, it addresses some quite appealing issues. First, the case poses interesting questions on the admissibility of the reference for a preliminary ruling. Here, the Advocate General's and the Court's views disagree, which opens a general debate around the preliminary ruling reference mechanism. Second, the case deals with the obligation of the executing authority to decide on each incoming EAW, even if an earlier one relating to the same person and the same facts had already been refused. Third, the ECJ had the opportunity, for the first time, to specify its case law on the provisions reflecting the ne bis in idem principle in the Framework Decision on the European Arrest Warrant (Arts. 3(2) and 4(3)). This article stresses that the ECJ lays down the foundation of a neatly subjective ne bis in idem principle, which primarily refers to the requested person rather than to the offence that was the subject of criminal proceedings.

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> "…it is, first and foremost, for the executing Member State to trust the actions of the issuing Member State. However, the issuing Member State must also trust the actions of the executing Member State when the latter relies on grounds of refusal of execution of an EAW."
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> (Opinion of Advocate General Szpunar, Case C-268/17, AY, paragraph 32)

Context of the AY Case: Facts and Questions Referred

In 2011, the Croatian Office for Suppression of Corruption and Organised Crime (USKOK) requested Hungarian authorities to interview *AY* as a suspect in the context of a corruption-related investigation carried out in Croatia. Hungary declined the request on the grounds of national interest but opened an investigation on the same facts, interviewing *AY* as a witness. This investigation was closed by the Hungarian National Bureau of Investigation (HNBI) in 2012. The Croatian investigation was also suspended in December 2012. In 2013, the USKOK issued a European Arrest Warrant (EAW) against *AY* over the same facts. The Budapest High Court refused it, claiming that criminal proceedings had already been brought before the court in Hungary for the same acts and that these proceedings had been stopped. After said decision, *AY* moved to Germany and Austria, where authorities also refused to take action on the Interpol notice, as its execution could infringe the *ne bis in idem* principle – taking into account the Hungarian refusal of the EAW. In 2015, after an indictment against *AY* in Croatia, a new EAW was issued, this time by the Zagreb County Court. This EAW was not executed by Hungary either. In 2017, the EAW was reissued, stating that circumstances had changed and criminal that proceedings against *AY* had been brought before the court. After not having received any answer from the Hungarian authorities, the Zagreb court contacted the authorities via Eurojust in order to know their position; the Hungarian authorities replied that the case had already been decided and, therefore, they were not obliged to act on the EAW.

Essentially, the referring court asked whether Arts. 3(2) and 4(3) FD EAW must be interpreted as meaning that a decision by the public prosecutor's office, terminating an investigation against an unknown person, in which the individual was merely interviewed as a witness, may be relied on to refuse to execute an EAW under either of these provisions (questions 1 to 4). Calling to mind, Art. 3(2) FD EAW includes among the mandatory grounds for refusal of EAWs the case in which a Member State has finally judged the requested person *"in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State."* And Art. 4(3) lists as an optional ground for refusal the situation where *"the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the EAW is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings."*

In addition, the referring court asked whether Art. 1(2) FD EAW – the obligation of Member States to execute any EAW on the basis of the principle mutual recognition – must be interpreted as requiring the executing authority to adopt a decision on any EAW forwarded to it, even when a ruling in that Member State had already been made on a previous EAW concerning the same person and the same acts, but the second EAW was issued by a different authority on account of the requested person's indictment (question 5).

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II. The Admissibility Question: Reference by the Issuing Authority?

1. The Advocate General's Opinion

In his opinion of 16 May 2018, Advocate General (AG) *Szpunar* distinguishes two groups of questions for the preliminary ruling: (1) questions 1 to 4, which he considers outside of the CJEU's jurisdiction and (2) question 5, which he considers the only admissible one.[1]

Regarding questions 1 to 4, the AG underlines that the preliminary reference is somewhat unusual. The answer provided by the Court would only concern the executing authorities, who are generally responsible for seeking clarity to ascertain whether they may or may not execute an EAW. In this case, the reference was made by the issuing authority (i.e., the Zagreb County Court), and it seems that the Zagreb court's subsequent action would depend on the decision of the ECJ: If the ECJ determines that grounds for refusal are sound, the EAW should be withdrawn. Concerning questions 1 to 4, the AG not only discards the admissibility of the request for a preliminary ruling but even denies the jurisdiction of the ECJ.[2] The AG's analysis is primarily based on the lack of necessity of the Court's reply on the procedure before the referring court, because there is no link between the EAW withdrawal and the existence of non-execution grounds. Should the ECJ hold that Hungarian authorities can rely on Arts. 3(2) or 4(3) FD EAW to refuse the EAW, the referring court could maintain or withdraw the EAW. Ultimately, questions 1 to 4 referred for preliminary ruling concern interpretation of Hungarian law in the light of the FD EAW, and only the Hungarian authorities, not the referring court, would be bound by the ECJ's decision.[3]

On the contrary, the AG finds the ECJ competent to deal with the fifth question, considering it pertinent to answer this question: It is necessary for the authorities of the executing Member State but also necessary for the referring court "to know whether it can legally expect a response from the executing judicial authority. This will enable the referring court to establish whether it should withdraw the second EAW or not. Question 5 is the only one which does not require any interpretation of Hungarian law by the referring court."[4]

2. The Approach of the European Court of Justice

The ECJ does not address the matter of the admissibility of the reference from the perspective of jurisdiction but rather from that of the admissibility of the preliminary ruling.[5] The inadmissibility of references on the basis of Art. 267 TFEU is an exception, the Court being obliged to rule if the questions raised refer to the interpretation of Union law.[6] Such obligation only lapses in three situations:

- If it is evident that the interpretation of EU law being sought is unrelated to the facts of the main action or its object;
- If the problem is hypothetical;
- If the Court does not have before it the factual or legal material necessary to provide a useful answer to the questions submitted.

The Court underlines that the present case does not correspond to any of these situations. The Zagreb County Court is dealing with both a trial *in absentia* against *AY* and the EAW proceedings and maintains that the withdrawal of the EAW depends on the ECJ's responses. Although the issues raised mainly refer to the obligations of the executing judicial authority, the issuance of the EAW may lead to the arrest of the

requested person, affecting his freedom. The Court held, *inter alia*, in *Piotrowski* that the observance of fundamental rights in EAW proceedings primarily falls within the responsibility of the issuing Member State.[7]

3. The controversy between the AG and the ECJ

The ECJ's judgment triggers an exciting debate, establishing a doctrine of Art. 267 TFEU that will likely expand our understanding of the boundaries of the preliminary ruling reference. For his part, the AG's reading of Art. 267 draws different conclusions despite being in line with the Court's recommendations about the initiation of preliminary ruling proceedings and with the binding effect that ECJ decisions in this field have.

The ECJ's rationale, which holds that the EAW affects the requested person's liberty is of undeniable general validity, but it should be carefully scrutinised in this case, since *AY* was free, and Hungary had already denied his surrender. In other words, as far as Hungary was concerned, there was no risk that the Croatian decision to maintain or withdraw the EAW would affect *AY's* liberty. We should also bear in mind that the request for surrender had been indirectly refused in Germany and Austria at the police level. As a consequence, the climate was unfavourable to *AY's* surrender, and there was little to no arrest risk for him in any of the States linked to this matter.

On the other hand, the AG's view, with which I basically agree, shows a divergent position that may appear as somehow inconsistent; his line of argument varies, without a clear explanation for such a different approach. Regarding questions 1 to 4 (interpretation of Arts. 3 (2) and 4 (3) FD EAW), he holds that the ECJ does not have jurisdiction to deal with them. By contrast, concerning the fifth question (interpretation of Art. 1 (2) FD EAW), he concedes that it can influence the EAW's withdrawal by the Croatian authorities. Therefore, he is in favour of an ECJ's decision on the merits of the case.

I do not aim to dive into the discussion between inadmissibility of the preliminary ruling reference and the ECJ's lack of jurisdiction, which the AG addresses. However, the wording of Art. 267 TFEU links the scope of application of the reference for a preliminary ruling with a situation in which a decision on the question is necessary to enable the referring Court to render judgment. Here, two questions arise: First, can we construe the decision to maintain or withdraw the EAW as equivalent to "judgment" in this context? Second, can we assume for this purpose that the case the referring authority is dealing with does not just involve the criminal proceedings but could also be the very EAW under consideration? In the present case, there was an ongoing criminal proceeding *in absentia* against *AY* in Croatia in addition to the EAW request for his surrender. Hence, it is questionable whether the criminal proceeding depended on the response of the ECJ in the preliminary ruling reference or whether just the EAW depended on it.

The questions posed to the ECJ seem rather not aim to elucidate a doubt emerged to the Croatian part, but instead to validate the actions of the Hungarian authorities, eminently applying Hungarian law. Taken further, the third question in the preliminary ruling reference (i.e. whether the decision to terminate an investigation, in which the requested person was merely interviewed as a witness, constitutes, for the other Member States, a ground not to act on the EAW under Art. 3(2) FD EAW?) is, in my view, highly hypothetical, as it does not concern Hungary's actions but the involvement of a third Member State.

However, we can assume that the controversy has been definitely settled by the ECJ's ruling in *AY* and the recent *Gavanozov case*. In *Gazanozov*, the Court decided on a preliminary ruling reference from the issuing authority of a European Investigation Order (EIO). The ECJ faced questions on the compatibility of the referring authority's national law with the EIO Directive. Although the Court neither broaches this time the issue of the admissibility of a preliminary ruling reference coming from the issuing authorities nor refers to the *AY* case, it implicitly reiterates its position in favour of the admissibility of such references.

III. The Executing Authority's Obligation to Adopt a Decision on the EAW

The fifth question referred to the ECJ asks whether Art. 1(2) FD EAW must be interpreted as requiring the executing authority to adopt a decision on any EAW forwarded to it, "...even when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts, but the second EAW has been issued only on account of the indictment, in the issuing Member State, of the requested person."

In answering this question, both the AG[8] and the Court[9] agree that the Hungarian executing authority was obliged to decide on the surrender request received, despite the fact that it had previously refused another EAW issued in the same proceedings and relating to the same person. The AG's opinion is unclear as to whether the issuance of the second EAW by another judicial authority or *AY's* indictment is the relevant event that triggers such an obligation.[10] At first glance, the ECJ seems to link the executing authority's obligation to adopt a decision on the EAW with a change in the circumstances, especially the indictment of the requested person in the issuing Member State.[11] However, the Court underlines the absolute nature of the obligation to decide.[12] It reiterates that, from the wording of Art. 1(2) FD EAW and based on the principle of mutual recognition, and unless there are exceptional circumstances, the EAW refusal may only rely on the exhaustively listed non-execution grounds provided for by Arts. 3, 4 and 4a FD EAW.[13] The ECJ also argues that, in any case, pursuant to Arts. 15(1), 17(1) and (6) and 22 FD EAW, the executing judicial authority must decide, within the time limits and under the conditions defined in the instrument, on the requested person's surrender. Should any ground for refusal be applicable, it shall be detailed in the pertinent decision to be notified to the issuing authority. Consequently, if the executing judicial authority fails to respond to an EAW forwarded to it and fails to communicate its decision to the issuing authority, it would breach its obligations under the provisions of the FD EAW.

Upon closer inspection, we can therefore observe that the obligation to reach a decision on an EAW arises unconditionally by its mere reception and regardless of the new circumstances if it is a kind of "reissuance" of a previous request. The surrender of the requested person might be granted or refused but, in any event, the executing authority has to decide on the EAW it received. We can conclude from the judgment that it is not the analysis of the nature of the change in circumstances that is important but rather the obligation to decide on any EAW received; the validity of this obligation is separate from an inquiry in terms of any impact that the new circumstances might have on application of the *ne bis in idem* principle. In other words, should none of the circumstances have changed, the obligation to decide on the EAW would still exist.

IV. The Concept of *ne bis in idem* in the EAW Context

The core of the preliminary ruling reference lies on questions 1 to 4. These questions revolve around four issues:

(1) Regarding Art. 4(3) FD EAW: Is the decision by the executing state not to prosecute or stop criminal proceedings for the offence on which the EAW is based, related only to the offence itself or must it also refer to the person sought as a suspect or accused person in these proceedings?

(2) Can Art. 4(3) FD EAW be invoked as a ground for refusal if the requested person is merely a witness and not a suspect or accused person in the criminal proceedings?

(3) Regarding Art. 3(2) FD EAW: Can the decision to terminate an investigation if the requested person is only questioned as a witness be invoked as a refusal ground by a third Member State for surrender under that provision?[14]

(4) How can the mandatory and optional grounds for refusal set out respectively in Art. 3(2) ("the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts") and Art. 4(3), *in fine*, ("a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings") be articulated?

It is worth making some clarifications on these four issues: The first and second questions, which refer to Art. 4(3) EAW FD, correspond to non-identical scenarios with different elements: a) a decision not to prosecute or stop criminal proceedings was adopted; b) such a decision was taken before the criminal proceedings have been started or once they were in progress; c) the person sought played the role of investigated/accused or was just a witness in these criminal proceedings. The institution of criminal proceedings is a *conditio sine qua non* requirement for a person to acquire the status of investigated or accused person or even to give evidence in those proceedings as a witness. In this sense, the first question is crucial and goes straight to the core of the debate: Is the ne bis in idem an objective or subjective notion? Is it connected to the criminal proceedings or the persons concerned by the proceedings? On the one hand, the decision not to prosecute or stop criminal proceedings is linked with a fact or set of facts and also with a specific investigated or accused person. On the other hand, the fact that criminal proceedings are not brought against a specific person at a given moment does not imply that such a person might not qualify as an accused or person under investigation at a later stage. Merely being a witness in a criminal case is a neutral situation that, in principle, does not indicate any connection between the person who testifies and the crime, apart from the information he or she can provide.

The second question complements the first one by delimiting the scope of the problem, which makes it pertinent as well. However, it refers to a hypothetical situation that would hardly occur in practice, which is finding the pair: a decision not to prosecute and an individual who has reached the personal status of investigated/accused or witness. If a decision not to prosecute, as not to initiate proceedings is taken, no person can get the status of investigated/accused or witness. Hence, the only way to make sense out of the wording of the question would be considering that the decision not to prosecute is adopted concerning a particular person within ongoing criminal proceedings.

The third question underlines that Croatian authorities were not asking the CJEU about the Hungarian position. They rather indicate what would be the influence of the situation for EU Member States other the issuing State. The question implicitly reflect the attitude of Germany and Austria, those EU Member States that rejected acting on the EAW at the police level by taking into account the Hungarian decision.

1. The Advocate General's Opinion

a) Interpretation of Art. 3(2) FD EAW

Regarding the interpretation of Art. 3(2) FD EAW,[15] the AG first points out that the language versions differ as regards the phrase *"finally judged"*. This problem (which is also present in Art. 4(3) FD EAW) should not be underestimated, since a consistent translation is crucial to achieving a uniform legal understanding throughout the EU, not only from a linguistic but also from a conceptual point of view. The term *"finally judged"* seems to refer to a judgment handed down as the conclusion of criminal proceedings. The wording of Art. 3(2) contemplates explicitly only the event of a conviction by establishing the situation where "the executing judicial authority is informed that the requested person has been finally judged by a Member State

in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State."

AG *Szpunar* points out that the ECJ has not given a clear answer on the matter; nonetheless, its case law supports his opinion that Art. 3(2) of the FD EAW is not applicable to *AY's* situation:

- In *Mantello,* the ECJ interpreted the concept of "*finally judged*" broadly and – by transposing its case law on Art. 54 of the Convention Implementing the Schengen Agreement – concluded that the person sought is considered finally judged if, as a result of the proceedings, the public action was definitively extinguished or the accused person was definitively acquitted.[16] In the same judgment, it stated that the fact that a person has been definitively judged for the purposes of Art. 3(2) FD EAW has to be determined under the law of the executing State.
- In *Turansky,* the ECJ held that the *ne bis in idem* principle does not apply to a situation where the authority of a Member State examines the merits of the case and suspends the criminal proceedings before a suspected person is accused and where such decision neither bars further prosecution nor precludes new criminal proceedings, in respect of the same acts, in that State under its national law.[17]
- In *Kossowski*, it was established that a prosecutor's resolution "terminating criminal proceedings and finally closing the investigation procedure against a person could not be characterised as a final decision when it is clear that the procedure was closed without a detailed investigation having been carried out."[18]

On the one hand, the AG concedes that, based on the relevant documentation provided in the case at issue, it was not possible to determine whether such an in-depth investigation had been performed in Hungary; however, following the principle of mutual trust, it must be presumed, since the Croatian court was unable to rebut that presumption, which is not an easy task for the referring court. On the other hand, the AG stresses that these considerations are hypothetical, given that AY had never been an accused at a certain stage in the proceedings. Thus, contrary to the views of the Hungarian government and AY, the situation of the requested person does not fall within the category of a person "finally judged" according to the meaning of Art. 3(2) FD EAW.

b) Interpretation of Art. 4(3) FD EAW

Regarding Art. 4(3) FD EAW, the AG calls to mind that the ECJ has not yet interpreted this provision, although it established in *Poplawski*[19] that the executing authority has a margin of discretion to refuse surrender *a priori.* The AG also stresses that the scope of Art. 4(3) is partly wider than Art. 3(2) FD EAW, because it refers to the offence rather than to the person sought, and the provision has an optional nature, meaning that *ne bis in idem* cannot limit or curtail it. Nonetheless, the first limb of Art. 4(3), which is at stake in the present case, is a manifestation of the *ne bis in idem* principle, like Art. 3(2). Although it is not apparent from the wording of Art. 4(3) that the proceedings must be directed against the requested person, it would be too excessive to interpret this provision as being applicable if the facts were the same, but the persons concerned were different. On the contrary, a more restrictive interpretation aligns with national legislations establishing first investigations *in rem* and then *in personam*; it is not possible to conclude that a crime has been committed from the investigation *in rem*.

According to the AG, the decision not to initiate or to conclude criminal proceedings must refer to the requested person. Yet, it is not necessary that such person has been formally classified as an accused person or a suspect. The decisive factor is *"...the possibility that the sought person committed the offence in question has been examined."* Nonetheless, Art. 4(3) FD EAW would not apply to the present situation since Hungarian authorities have concluded the proceedings without AY having been accused or investigated and

without having examined the possibility that he has committed the offence on which the EAW issued by Croatian authorities is based."

2. The Decision of the European Court of Justice

a) Interpretation of Art. 3(2) FD EAW

The ECJ concurs with the AG's opinion[20] but adds some useful remarks that elucidate a number of specific interpretative issues.[21] The term "judgment" might not only refer to a court decision but also to other decisions from judicial authorities such as decisions of a prosecutor to definitely discontinue criminal proceedings.[22] According to its doctrine in *Mantello*, the person sought is deemed to have been finally judged in respect of the same facts, *"when, as a result of criminal proceedings, further prosecution is definitively barred or when the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts."*[23]

The term "final judgment" in Art. 3(2) FD EAW presupposes the existence of criminal proceedings initiated against the requested person.[24] The ne *bis in idem* principle applies only to persons who have been definitively tried in a Member State, not to those who have only been called as witnesses.[25] Technically, *AY* had not been judged in this regard. In conclusion, the Hungarian prosecutor's decision to terminate an investigation in which *AY* had merely been interviewed as a witness cannot be relied on to refuse the EAW under said Art. 3(2).

b) Interpretation of Art. 4(3) FD EAW

Regarding Art. 4(3) FD EAW, the judges in Luxembourg underline that the provision is broken down into three optional sub-grounds for refusal, devoting separate considerations to each of them: The first and third sub-grounds are not applicable to the present scenario. The first sub-ground justifies refusal if the executing authorities decide not to prosecute for the offence. Obviously, such circumstances do not match those in the *AY* case in which Hungary opened a case based on the same facts, and the HNBI's decision does not concern the discontinuance of criminal proceedings. Analogously, the case does not fall within the scope of the third sub-ground for refusal either, as it requires a third EU Member State's final decision preventing further proceedings.

Conversely, pursuant to the second sub-ground in Art. 4(3), the enforcement of an EAW may be refused when the executing judicial authorities have decided to halt proceedings in respect of the offence on which the EAW is based. The bulk of the ECJ's reasoning and the most illuminating part of its interpretation of the *ne bis in idem* revolve around this matter, which leans decidedly towards a subjective conception of such principle. The judgment follows two lines of argumentation:[26]

First, the ECJ observes that the wording of the second sub-ground refers solely to the offence, not to the requested person. However, pursuant to Art. 1(1) FD EAW, the EAW is a judicial decision issued for an offence against a specific person. Sharing the Commission's argumentation, the Court concludes that an interpretation of this second sub-ground, according to which the execution of an EAW could be refused *"where that warrant concerns the same acts as those that have already been the subject of a previous decision, without the identity of the person against whom criminal proceedings are brought being considered relevant would be manifestly too broad..."* In the present case, an investigation was conducted against an unknown person; therefore, the decision which terminated that investigation was not taken in respect of *AY,* who was not involved in the criminal proceedings in the sense of the first paragraph of Art. 4(3) FD EAW. This means that no decision not to prosecute or halt proceedings has been taken in relation to him."[27]

Second, the Court makes supplementary considerations that relate to the insertion of the provision in the mutual cooperation system within the AFSJ. The Court has continuously held that the grounds for non-execution provided for in the FD EAW must be interpreted strictly.[28] Following the doctrine in *Kossowski*, the ground for refusal provided for in Art. 4(3) is not intended to prevent a person from having to submit to successive investigations for the same acts in several Member States. In conclusion, the refusal of the EAW cannot rely on the second sub-ground for non-execution laid down in Art. 4(3) FD EAW.

3. Comparison between the Views of the AG and the ECJ

AG *Spunzar's* opinion and the final judgment of the ECJ in AY triggers some interesting discussion points:

First, the AG's opinion gives a divergent interpretation of the provisions at issue. As regards Art. 3(2) FD EAW, it submits that it does not apply to *AY* since his participation in the proceedings was solely as a witness. The AG, therefore, advocates a subjective concept of the *ne bis in idem* principle (within the meaning of Art. 3(2)), which can be characterised as not being broad enough to include the position of an individual neither investigated nor accused in the criminal proceedings as giving rise to the EAW. As regards Art.4(3) FD EAW, the AG concludes that the essential issue for application of this article is not the investigation or accusation of the person concerned but rather his/her possible connection with the offence examined in detail in these proceedings. This latter interpretation introduces an important nuance, without departing from a subjective perspective on the construction of the *ne bis in idem* principle.[29]

We should bear in mind that the nature of the grounds for refusal in both articles is different. On the one hand, Art. 3(2) FD EAW is a mandatory ground for refusal; it concerns the requested person, depends on the action of a third EU Member State, and is linked to the termination of criminal proceedings by a final decision. On the other hand, the first and second sub-grounds for refusal in Art. 4(3) FD EAW are optional; they relate to the offence and not to the person, are dependent on the actions of the executing State itself, and are linked to the decision not to prosecute or halt proceedings for the offence on which the EAW is based. Nevertheless, the third ground in this provision, despite also being optional, is close to Art. 3(2) FD EAW, since the factual assumption is that a Member State has passed a final decision on the requested person concerning the same acts, thus preventing further proceedings.

Therefore, we could argue that the most logical way of giving sense to the AG's approach is the differentiation of two situations. The first situation is foreseen in Art. 3(2) FD EAW, whose application necessarily requires that the requested person has the status of an accused person, because, without it, he/she could hardly have been finally judged. In contrast, the second situation is related to Art. 4(3) FD EAW, where the *ne bis in idem* principle is articulated if the executing State decided not to prosecute or to halt proceedings. However, this approach (i.e., not strictly requiring the person sought to have been accused or investigated) only applies to the first and second sub-grounds of Art. 4(3) FD EAW, where decisions not to prosecute or to halt proceedings have been adopted. As for the third sub-ground, where a final judgment has been passed, the consistent construction should be equivalent to that for Art. 3(2) FD EAW, i.e., to require the person sought to have the status of accused because otherwise, it would not be possible to deliver a final judgment concerning him or her.

Second, the AG's view does not appear to match the ECJ's judgment as to the subjective spectrum of *ne bis in idem*: While the AG admits that Art. 4(3) FD EAW could apply even if the requested person has not been investigated or accused, the position of the judges in Luxembourg seems to be contrary. For application of the second sub-ground for refusal of Art. 4(3), the ECJ is more restrictive in this regard. The Court does not explicitly require that the requested person has been investigated or accused in the proceedings motivating the EAW issuance. However, the judgment states that application of this provision requires that the EAW concern the same acts as those that had already been the subject of a previous decision and that the identity

of the person against whom criminal proceedings are being brought are considered relevant. Although both positions are not so far apart, the ECJ's position is more restrictive. The ECJ declares Art. 4 (3) inapplicable if *AY* was interviewed as a witness only, without criminal proceedings having been brought against him and if the decision terminating the investigation was not taken in respect of that person. Conversely, the position of *AY* in the criminal proceedings should have been similar, if not identical, to that of an investigated or accused person in order to make Art. 4(3) FD EAW applicable.

V. Concluding Remarks

The ECJ's judgment in *AY* (case C-268/17) is important in several ways:

- It outlines the vast scope of the preliminary ruling reference, conceding that the reference may be raised by the issuing authority of a European Arrest Warrant, even when much of its content may refer to application of the law of the executing Member State.
- It unequivocally establishes the obligation of an EU Member State to rule on an EAW received.
- It clearly defines an openly "subjective *ne bis in idem*" approach. Key elements to be assessed are the nature of inserting the requested person into the proceedings that give rise to an EAW and determining his/her possible link to the committed offence in the proceedings.
- The case fueled a wider debate in which the positions of the AG and the judges in Luxembourg clashed as well as complemented and enriched each other, opening up an interesting field of study in the area of ne bis in idem.

  However, the reader should bear in mind: AY was, in fact, never surrendered to Croatia.[30] This brings us back to the question of the weakening of the principles of mutual recognition and mutual trust and it leads to the question of the way forward in terms of strengthening cross-border cooperation mechanisms within the AFSJ.

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1. Opinion of Advocate General Szpunar, delivered on 16 May 2018, Case C-268/17, *Ured za suzbijanje korupcije i organiziranog kriminaliteta v AY*, paras. 22-33.↩
2. Citing AG opinions in C-497/12, case *Gullotta y Farmacia di Gullotta Davide & C*; C-165/14 and C-304/14, case *Rendón Marín and CS*; see also C. Naômé, *Le renvoi préjudiciel en droit européen-Guide pratique,* 2nd edition, 2010, pp. 85 and 86.↩
3. Opinion of Advocate General Szpunar, op. cit. (n. 1), paras. 30, 31.↩
4. Opinion of Advocate General Szpunar, op. cit. (n. 1), para. 34.↩
5. ECJ, judgment of 25 July 2018, Case C-268/17, *AY,* paras. 24-30.↩
6. Reference is made to ECJ, 12.10.17, case C-278/16, *Sleutjes* (para. 22 and case law cited there).↩
7. ECJ, 23.01.2018, case C-367/16, *Piotrowski,* para. 50.↩
8. Opinion of Advocate General *Szpunar*, op. cit. (n. 1), paras. 35 to 39.↩
9. ECJ, 25.7.2018, C-268/17, op. cit. (n. 5), paras. 33 to 36.↩
10. Opinion of Advocate General *Szpunar*, op. cit. (n. 1), para. 39 *in fine.*↩
11. ECJ, 25.7.2018, C-268/17, op. cit. (n. 5), para. 32.↩
12. *Ibid.*, paras. 33 to 36.↩
13. The ECJ reiterated in several judgments that grounds for refusal of EAWs shall be interpreted in a restrictive way. See, among others, judgments of 10.08. 2017, case C-270/17 PPU, *Tupikas* or 25.07.2018, case C-216/18 PPU *LM*.↩
14. The original wording of the third question was as follows: "Does the decision to terminate an investigation in which the requested person did not have the status of a suspect but was interviewed as a witness constitute, for the other Member States, a ground not to act on the [EAW] which has been issued in accordance with Article 3(2) of Framework Decision [2002/584]?" The terminology is worth clarifying here: An investigation carried out by the police or directed by the prosecutor is not equivalent to criminal proceedings.↩
15. The AG reverses the order of the questions and starts his examination with questions 3 and 4, which refer to Art. 3 (2) FD EAW.↩
16. ECJ, 16.11.2010, case C-261/09, *Mantello.*↩
17. ECJ, 22.12.2008, case C-491/07, *Turanský.*↩
18. ECJ, 29.06.2016, case C-486/2014, *Kossowski.*↩

19. ECJ, 29.06.2017, case C-579/15, *Poplawski,* point 21 *"…where a Member State chose to transpose that provision [Art. 4(6) FD EAW] into domestic law, the executing judicial authority must, nevertheless, have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW. In that regard, that authority must take into consideration the objective of the ground for optional non-execution set out in that provision..."*↩
20. As the AG, the ECJ starts with answering the questions on the interpretation of Art. 3(2) FD EAW. Cf. ECJ, 25.7.2018, C-268/17, *op. cit.* (n. 5), paras. 37-46.↩
21. For a holistic overview, see D. Sarmiento, "Ne Bis in Idem in the Case Law of the European Court of Justice", in B. van Bockel (ed.), *Ne Bis in Idem in EU Law*, Cambridge University Press, 2016, pp. 103 et seq.↩
22. This follows from the ECJ's decision in *Kossowski, op. cit.* (n. 20), para. 39 and case law cited there. Judicial authority and judicial decision are autonomous concepts of EU law, the first one including, under certain circumstances, the prosecutors; therefore, the decisions resolving a case and emanating from them might well be considered judicial decisions. Cf., among others, ECJ, 29.05.2019, Case C-509/18, *PF*; ECJ, 12.12.2019, Case C-625/19 PPU, *XD*; ECJ, 12.12.2019, Case C-627-19 PPU, *ZB*; ECJ, 12.12.2019, Joined Cases C-566/19 PPU and C-626/19 PPU, *JR-YC*.↩
23. ECJ, *Mantello, op. cit.* (n. 16), para. 45 with further references to the ECJ's case law.↩
24. ECJ, 05.06.2014, case C-398/12, *M*.↩
25. ECJ, 28.09.2006, case C-467/04, *Gasparini.*↩
26. ECJ, 25.7.2018, C-268/17, op. cit. (n. 5), paras. 50-60.↩
27. The Court bases this interpretation on the antecedent of the first part of Art. 4(3), which is Art. 9 of the European Convention on Extradition signed in Paris on 13 December 1957. According to this provision, it allows *"extradition refusal when the authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences. The explanatory report to the Convention states that the provision covers the case of a person 'in regard to whom' a decision has been taken precluding proceedings or terminating them."*↩
28. ECJ, 23.01.2018, case C-367/16, *Piotrowski*, para. 48 and the case law cited there.↩
29. In this context, the AG's opinion follows the subjective approach but not necessarily requiring that the person has acquired the formal status of accused or investigated. Contrarywise, according to the AG's position, it would be enough for invoking the ne bis in idem, as reflected in Art. 4(3) EAW FD, if the involvement of the person in the crime committed has been scrutinised in depth.↩
30. In September 2018, the Hungarian Ministry of Justice informed the Zagreb county court that the EAW had been refused based on the ECJ's doctrine in case C-216/18 PPU, *LM*, because his fundamental rights being endangered if surrendered to Croatia. The Ministry also reported that Art. 4(3) FD EAW was applicable to criminal proceedings being conducted in Hungary against *AY* as an accused person.↩

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