

# AG: Independence of Executing Judicial Authority Necessary to Decide on EAW Issues

## News

**Thomas Wahl**

In his [opinion of 25 June 2020](#), Advocate General (AG) *Campos Sánchez-Bordona* supports not recognising a public prosecutor's office exposed to the risk of being subject, directly or indirectly, to directions or instructions from the executive in specific cases as an authority that can grant consent for possible prosecution of offences other than those for which a person is surrendered (Art. 27 para. 3 lit. g) FD EAW).

### *Background of the case*

The case ([C-510/19](#)) goes back to a reference for a preliminary ruling by the Court of Appeal Brussels/Belgium, which, in essence, asks whether the Dutch public prosecutor's office (Openbaar Ministerie) is covered by the concept "judicial authority" as established by recent CJEU case law (see the landmark judgment in [Joined Cases C-508/18 \(OG\) and C-82/19 PPU \(PI\)](#) = [eucrium 1/2019](#), pp. 31-32 and the follow-up judgments delivered on 12 December 2019 in [Joined Cases C-556/19 PPU and C-626/19 PPU](#) (French Public Prosecutor's Office), [Case C-625/19 PPU](#) (Swedish Prosecution Authority), and [Case C-627/19 PPU](#) (Belgian Public Prosecutor's Office) = [eucrium 4/2019](#), pp. 242-245).

### *Legal question*

Unlike previously decided cases that dealt with the question of whether the public prosecutor's office of a Member State is independent enough to *issue* EAWs (Art. 6(1) FD EAW), the case at issue concerns the subsequent consent of the public prosecutor in the executing State (here: Netherlands) to an extended prosecution of offences not recorded in the initial EAW submitted by the Belgian authorities. In other words, the case combines an interpretation of Art. 6(2) FD EAW – the conditions that must be met by the authority *executing* an EAW – in conjunction with the speciality rule and its exceptions as provided for in Art. 27 FD EAW.

### *The AG's opinion*

The AG first observes that the arguments in the context of Art. 6(1) FD EAW can be extrapolated to interpretation of Art. 6(2) FD EAW. The concept of "judicial authority" requires an autonomous interpretation. Second, the AG calls to mind the conditions set up by the CJEU for "issuing judicial authority." In the concrete case at issue, however, the AG thirdly observes that the question is not whether the Dutch public prosecution office had the status of "executing judicial authority" in the abstract sense but whether it was able to consent to the aforementioned extension of punishable offences in accordance with Art. 27 para. 3 lit. g) FD EAW. It follows from a contextual interpretation that the authority that can provide consent can only be the entity that executed the EAW. Since it was the District Court of Amsterdam (Rechtbank Amsterdam) that decided on the

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execution of the first EAW, the Netherlands public prosecutor's office was actually not competent to give the consent as referred in Art. 27 FD EAW.

### *"Alternative dispute resolution"*

Since the Openbaar Ministerie took the view that the procedural autonomy of the Member States allows a different designation of "consenting judicial authority" and "judicial authority executing an EAW," the AG alternatively examined the conditions that have to be met in order to be able to consent to an extension of the offences recorded in an already executed EAW.

*Sánchez-Bordona* argues that a national public prosecutor's office is capable of acting both as a "consenting" and "executing" judicial authority only if the conditions that the CJEU set up for a public prosecutor's office to be able to issue an EAW are met, namely:

- Participation in the administration of justice;
- Independence;
- Amenability of decision to judicial review.

As the case shows, decisions by the executing judicial authority can have the same impact on the right to liberty of the person concerned as the issuing of an EAW.

Therefore, the authority must be in a position to perform the function objectively and independently. It must not be exposed, any more than the issuing judicial authority should have been, to the risk that its decision-making power be subject to external directions or instructions from the executive. This was not the case in the Netherlands when the events of the dispute took place. As a result, the risk of the Openbaar Ministerie being exposed to directions or instructions from the executive in specific cases means that it can neither be classified a "judicial authority" within the meaning of Art. 6(2) nor grant the consent referred to in Art. 27(3) (g) of the FD EAW.

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