

# CJEU Clarifies its Case Law on Concept of “Judicial Authority” Entitled to Issue EAWs

Thomas Wahl

On 12 December 2019, the CJEU provided further guidance under which conditions public prosecutor’s offices can be regarded as “issuing judicial authority” within the meaning of Art. 6(1) of the 2002 Framework Decision on the European Arrest Warrant (FD EAW). Uncertainties were triggered after the CJEU’s judgments of May 2019, in which the Court found that the German public prosecutor’s offices are exempt from the concept of “issuing judicial authority” because they may be subject to directions or instructions from the executive. The Court distinguished this case from the Prosecutor General of Lithuania who was considered a “judicial authority” that can issue EAWs, under the condition that his/her decisions are subject to court proceedings fully meeting the requirements inherent to effective judicial protection. For these landmark judgments, see [eucrim 1/2019](#), pp. 31-34.

## The Cases at Issue

In the three cases decided on 12 December 2019, courts in Luxembourg and the Netherlands, which had to deal with the execution of EAWs, casted doubts whether the requirements set up in the decisions of May 2019 are met in view of the French, Swedish and Belgian public prosecutor’s offices. The cases are referred to as follows:

- Joined Cases [C-566/19 PPU](#) and [C-626/19 PPU](#) (French Public Prosecutor’s Office);
- Case [C-625/19 PPU](#) (Swedish Prosecution Authority);
- Case [C-627/19 PPU](#) (Belgian Public Prosecutor’s Office).

While the cases on EAWs issued by the French and Swedish public prosecutor respectively concern EAWs for the purpose of conducting criminal prosecutions, the “Belgian” case concerned an EAW issued for the purpose of enforcing a criminal judgment.

## Questions by the Referring Courts

Regarding the French public prosecutor’s office, the referring courts considered the following problems that may undermine the required independence in accordance with the CJEU’s case law:

- Although the French Ministry of Justice cannot direct instructions in *specific* cases, it may 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;

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- 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.

In addition, the referring Dutch court observed that 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. This argument was also put forward as regards the Swedish public prosecutor who issues EAWs after the criminal first instance court had ordered pre-trial detention against the suspect.

#### [The CJEU's Arguments Regarding the French and Swedish Public Prosecutor's Offices](#)

Referring to its judgments of May 2019, the CJEU clarified that the examination of whether an authority participating in the administration of criminal justice – but which is not a judge or court – capable in an EU Member States to issue EAWs falls under the concept of “judicial authority” within the meaning of the FD EAW requires a two-step approach. First, it must be examined whether the Member State afforded the authority a status that sufficiently guarantees independence for the issuing of EAWs. This independence is excluded if the authority is at risk of being subject to directions or instructions in a specific case from the executive. By contrast, the independence is not called into question by the fact that the Minister of Justice may issue general instructions on criminal policy. Likewise, it does not matter that the authority is responsible for conducting criminal prosecutions nor that the staff is under the direction and control of their hierarchical superiors, and thus obliged to comply with the instructions within this hierarchy. As a result, the CJEU concludes that the French public prosecutor's office – in contrast to the German one – fulfils the requirement of independence. French public prosecutors can make an independent assessment of the necessity of issuing an EAW and its proportionality, and they can exercise that power objectively.

Second, the CJEU clarified the requirement (established by the previous case law) that there must be the possibility of bringing court proceedings against the decision of the public prosecutor to issue an EAW, and these court proceedings must comply with the principle of effective judicial protection. The Luxembourg judges pointed out that the EAW system contains a two-tiered protection of the individual's procedural and fundamental rights. The protection at the first layer – the national decision on a national arrest warrant – must be supplemented by a protection as regards the issuance of the EAW (second layer). This implies that the requirements inherent in effective judicial protection must be afforded at least at one of the two layers. The establishment of a separate legal remedy against the decision to issue an EAW is only one possibility. Instead, legal orders of the EU Member States can also meet the criteria of judicial protection if the 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. In conclusion, the French and Swedish systems satisfy those requirements.

#### [The CJEU's Arguments Regarding the Belgian Public Prosecutor's Office and the EAWs Issued for Enforcing Sentences](#)

Regarding the specific case where the EAW was issued for the purpose of enforcing a custodial sentence imposed by a final judgment (“the Belgian case”), the CJEU found that the requirements of effective judicial protection is satisfied by the judicial review carried out by the enforceable judgment on which a subsequent EAW is based. The CJEU argued that in these cases it makes no sense to require a separate appeal against the public prosecutor's decision. The executing judicial authority can presume that the decision to issue an EAW resulted from judicial proceedings in which the requested person had all the necessary safeguards in respect of his/her fundamental rights. In addition, the CJEU points out that the FD EAW already contains a

proportionality assessment because EAWs can only be issued for the purpose of enforcing custodial sentences if the sentence is at least four months.

### Put in Focus

In sum, the CJEU ruled that the French, Swedish and Belgian public prosecutor's offices satisfy the requirements for issuing an EAW.

It seems that Germany is the only EU Member State at the moment where its public prosecutor's offices are not entitled to issue EAWs following the CJEU ruling in the Joined Cases [C-508/18](#) and [C-82/19 PPU](#). In a judgment of 9 October 2019, the CJEU already confirmed the validity of EAWs issued by the Austrian public prosecutor (see [eucrim 3/2019](#), p. 178). All EU Member States also replied to a questionnaire issued by Eurojust advocating that their national public prosecutor's offices are not affected by said CJEU judgment of May 2019 on the "German case" (see [eucrim 2/2019](#), p. 110).

The question remains, however, whether the CJEU overshot the mark with its May ruling. As the German government argued in the proceedings before the Court, there had never been a single case in which the German ministries of justice issued directions or instructions towards a public prosecutor to issue or not to issue EAWs. Like in the Swedish and French system, the basis for issuing an EAW (for the purpose of prosecution) is the investigative judge's decision on whether a national arrest warrant is to be issued. It must also be questioned whether the examination of the prerequisites to issue EAWs is a routine for the national judges – more or less rubber-stamping the prosecutor's applications. In short, a rather concrete assessment of the individual cases would have been the much better approach instead of scrutinising the legal situation of independence in an abstract way.

Interestingly, the CJEU differs in its judgments of 12 December 2019 from the opinion of the Advocate General. AG *Campos Sánchez-Bordona* concluded in his [opinions of 26 November 2019](#) that the French public prosecutor's office cannot be regarded as an "issuing judicial authority". He argued that the concept of the independence of the judicial authority implies that the public prosecutor is not subject to any hierarchical constraint or subordination. This includes not only the reception of instructions in specific cases, but also of general instructions as it is the case in the French system.

AG *Sánchez-Bordona* also advocated more stringent requirements as regards the individual's legal protection. According to his opinion, the requested person must be able to challenge the EAW issued by the public prosecutor before a judge/court in the issuing Member State, without having to wait until he is surrendered, as soon as this warrant has been issued (unless this would jeopardise the criminal proceedings) or notified to him.

Finally, the AG set out a divergent view as regards EAWs issued by the public prosecutor for the purposes of enforcing a custodial sentence. The AG required that the enforceable decision must be capable of being the subject of court proceedings similar to those that apply in the case of EAWs issued for the purpose of conducting criminal prosecution. Thus, he voiced doubts whether the Belgian system affords the necessary legal protection.

In conclusion, one cannot dismiss the impression that the judges in Luxembourg strived for mitigating the consequences of their initial ruling on the German public prosecutors by its subsequent judgments of October and December 2019 (Austrian, French, Swedish and Belgian public prosecutor's offices). The latter judgements stress more the procedural autonomy of the EU Member States since the Court acknowledged that procedural rules may vary as regards the implementation of sufficient procedural safeguards.

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