

# CJEU: Execution of an EAW in the Case of Judgments in Absentia

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## News

On 17 December 2020, the CJEU ruled on the execution of a European Arrest Warrant (EAW) based on a judgment rendered *in absentia* (Case C-416/20 PPU (*TR v Generalstaatsanwaltschaft Hamburg*)). The request for a preliminary ruling was submitted by the Hamburg Higher Regional Court.

### *Facts of the case and question referred:*

In the underlying case, *TR*, a Romanian national, was prosecuted in Romania. As he had fled to Germany, the proceedings concerning him, both at first instance and on appeal, took place in his absence. However, he had knowledge of at least one of these proceedings and was represented there by lawyers of his choice in the first instance and by court-appointed lawyers in the appeal. The hearings resulted in sentences of two terms of imprisonment. The Romanian authorities issued EAWs for their execution. *TR* defended himself against surrender by Germany, arguing that he had the right to a new trial (as guaranteed, *inter alia*, by Art. 9 of Directive 343/2016), but Romania did not guarantee this.

The referring court asks, in essence, whether it is entitled to refuse surrender if the issuing state does not fulfil the requirements of Directive 343/2016 on the defendant's right to be present at trial (in particular, Arts. 8 and 9 of the Directive).

### *Findings of the CJEU*

The CJEU clarified that the Hamburg court must decide whether surrender is inadmissible on the basis of the national provisions implementing Art. 4a FD EAW. According to Art. 4a, the executing judicial authority may refuse to execute an EAW issued for the purpose of enforcing a custodial sentence imposed in the absence of the person concerned, unless one of the groups of cases exhaustively listed therein applies.

Art. 4a does not allow the execution of an EAW to be refused solely because the executing authority has not received assurance that the person's right to a new trial will be respected if he/she is surrendered to the issuing State, even though he/she fled to the executing Member State (thus preventing his personal summons and appearance in person at the trial). By contrast, the fact that the person requested has given a mandate to a legal counsel appointed either by himself/herself or by the state, in knowledge of the scheduled hearing and was actually defended by this defence counsel, allows the surrender to be declared admissible in accordance with Art. 4a(1b) FD EAW.

The judges in Luxembourg state that the failure of the issuing Member State to comply with the provisions of Directive 343/2016 guaranteeing the right to a new trial cannot prevent the execution of an EAW; otherwise,

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the system established by the FD EAW would be circumvented. This is without prejudice, however, to the issuing Member State's obligation to comply with these provisions. Therefore, to the extent that the Member State has not transposed the Directive's provisions within the time limit or has not transposed them properly, the person concerned may rely on the provisions having direct effect in the courts of that Member State in the event of surrender.

Ultimately, the CJEU draws on its case law in *Tupikas* (C-270/17 PPU → [eucrim 3/2017/117-118](#)): If the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, the concept of "trial resulting in the decision", within the meaning of Art. 4a(1) FD EAW, must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on him. Therefore, it is up to the referring court to establish to its satisfaction whether the characteristics set out in Art. 4a FD EAW apply to a trial like the appeal proceedings in the present case.

At the same time, the CJEU stresses that Art. 4a FD EAW is a facultative refusal ground. This means that the executing judicial authority must also take into account the behaviour of the person requested. It is not prevented from giving green light to surrender, although it may conclude that surrender would be inadmissible if appeal proceedings were to be held *in absentia*.

*Put in focus:*

With its judgment in *TR v Generalstaatsanwaltschaft Hamburg*, the judges in Luxembourg reiterate that the grounds on which Member States may refuse to execute an EAW have been exhaustively enumerated and that the executing judicial authority may not make the execution of an EAW subject to other conditions. Art. 4a FD EAW must be considered *lex specialis* in relation to the provisions in Directive 343/2016 on the right to be present. The national court that decided on the execution of a European Arrest Warrant only has a limited right of review of the procedure in another EU Member State concerning questions of a fair trial. If violations of the rights stipulated in the EU's procedural rights directives occur, the defendant must raise his/her hand in the trial state; his/her surrender cannot be prevented.

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