

CJEU: German Public Prosecution Office is not a “Judicial Authority” in the EAW Context

Thomas Wahl

German public prosecution offices may no longer issue European Arrest Warrants. With this thunderbolt, the CJEU (Grand Chamber) answered two references for a preliminary ruling from Irish courts.

Background

In the [Joined Cases C-508/18 \(OG\) and C-82/19 PPU \(PI\)](#), the CJEU further developed its case law on the concept of “issuing judicial authority” within the meaning of Framework Decision 2002/584/JHA on the European Arrest Warrant (FD EAW). The case law started with the rulings of 10 November 2016 in cases [C-452/16 PPU \(Poltorak\)](#), [C-477/16 \(Kovalkovas\)](#), and [C-453/16 \(Özcelik\)](#) – see [eu crim 4/2016](#), 165-167. In these cases, the CJEU clarified that police services and ministries of justice are not an “issuing judicial authority” in the sense of Art. 1(1) and Art. 6(1) FD EAW. Confirmation by a prosecutor of an EAW that had been previously issued by a police authority can, however, be considered a “judicial decision” in accordance with Art. 8(1c) FD EAW.

In proceedings before Irish courts, the question was then raised as to whether public prosecution offices guarantee sufficient independence to be viewed as a “judicial authority” in the sense as required by the aforementioned case law. In addition to the questions relating to the German public prosecution service, the Irish Supreme Court also brought up a preliminary ruling concerning the Lithuanian Prosecutor General’s Office, which has the capacity to issue EAWs in Lithuania (case C-509/18, see [separate eu crim news](#)).

Facts of the Joined Cases

As regards the preliminary ruling proceedings on the German public prosecution offices, defendants whose surrender from Ireland had been requested by the prosecution services of Lübeck (case C-508/18) and Zwickau (case C-82/19 PPU) argued that, in fact, no “judicial authority” within the meaning of Art. 6(1) FD EAW was involved in the issuance of the European Arrest Warrants. The reasoning is as follows:

- 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.

AUTHOR

Thomas Wahl

Senior Researcher
Max Planck Institute for the
Study of Crime, Security and
Law

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Indeed, under German law, German public prosecution offices are commonly designated as the competent authority to issue European Arrest Warrants, especially those for the purpose of prosecution. Furthermore, there is a relationship between the public prosecutor's offices and the executive in Germany. In particular, public prosecutors are subject to the "external power" of the ministers of justice of the relevant federal state (*Land*) to issue instructions (*externes Weisungsrecht*). Germany argued, however, that this power is exercised only as an exception and that no instructions had been issued in the present case.

Questions Referred

Notwithstanding, the referring Irish Supreme Court and the Irish High Court cast doubt as to whether the structure and powers of the German public prosecution offices meet the so-called independence and administering of justice tests established by the CJEU in the "trias" rulings *Poltorak*, *Kovalkovas*, and *Özcelik*. They mainly want to know which criteria and parameters govern assessment of the term "independence" within the context of the FD EAW. If independent of the executive, the courts also ask whether a public prosecutor, who is confined to

- Initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully;
- the issuing of indictments;
- Executing judicial decisions and conducting the prosecution of criminal offences; and who
- Does not issue national warrants;
- May not perform judicial functions,

can be considered a "judicial authority" for the purposes of Art. 6(1) FD EAW.

Ruling of the CJEU

In its ruling of 27 May 2019, the CJEU first clarifies that the multiple questions referred to can be condensed to the essential question of "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."

In accordance with the principle of procedural autonomy, the CJEU first reiterates that, although Member States may designate, in their national law, the "judicial authority" competent to issue EAWs, the meaning and scope of that term cannot be left to the assessment of each Member State. Therefore, the term "judicial authority" requires an autonomous and uniform interpretation throughout the EU, taking into account the wording, context, and objective of the FD EAW.

The concept of an "issuing judicial authority" must cumulatively meet two criteria:

- 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).

The CJEU held that the first criterion is fulfilled: a public prosecution office, such as the German one, which is competent to prosecute a person for a criminal offence and bring that person before a court, must be regarded as "participating in the administration of criminal justice."

As regards the second criterion, the judges in Luxembourg focused on the protection of the procedural and fundamental rights of the person sought. Accordingly, the EAW system involves a dual level of protection: the first level provides judicial protection for a national decision, such as a national arrest warrant; the second level affords protection when a European Arrest Warrant is issued (possibly shortly after the adoption of the national judicial decision). At this second level, 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 Member States must guarantee that the “issuing judicial authority,” within the meaning of Art. 6(1) FD EAW, must meet the following capacities:

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

In other words: the issuing Member State must assure “that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive.”

In addition: if the authority to which the Member State confers the competence to issue EAWs is not itself a court, the decision to issue an EAW – and, in particular, the proportionality of such decision – must be subject to court proceedings, “which meet in full the requirements inherent in effective judicial protection.”

In view of the established parameters, the CJEU stated that the German public prosecution offices may, in a given case, be subject to instruction from the Minister for Justice of the relevant *Land*. Hence, they are not free from (direct) political influence. As a consequence, a criterion of the independence test as described above is not fulfilled.

The Luxembourg judges rejected the arguments by the German government that German law includes several safeguards that circumscribe the ministers’ power to issue instructions, so that situations in which this power could be exercised are extremely rare. According to the CJEU, the abstract existence of these powers already suffices, namely that the German public prosecution offices cannot be subsumed under the autonomous notion of “judicial authority.”

Put in Focus:

The CJEU’s Grand Chamber ruling will have considerable consequences on the German practice. Germany is one of the EU Member States that issues the most EAWs yearly (in 2018 and 2017, over 3700 EAWs were issued via the SIS). The vast majority of EAWs were issued by the public prosecution services. All issued EAWs have now become invalid and need to be reissued. At the moment, it is not clear, however, how the issuance of EAWs will be organised in the future. As [statements in an article on the judgment in the “Legal Tribune Online”](#) reveal, there are several possibilities:

- EAWs may be issued by the judge at the local court who issues national arrest warrants;
- EAWs may be issued by the trial court, or the court where a criminal case is currently pending, or a chamber that will execute a possible conviction.

In any event, the German law must be amended in the near future.

Probably like many other Member States, Germany considered the European Arrest Warrant framework to not only include a request for extradition/surrender, but that it is also an instrument for searching persons. This latter aspect now seems to have been pushed back by the CJEU, which made clear that the European

Arrest Warrant can be the basis for depriving a person of his/her liberty. Therefore, judicial oversight and control must be strong during the issuing phase of an EAW.

Still, questions remain open. The consequences of the CJEU's statements are not yet fully clear. The result of the joined cases C-508/18 and C-82/19 PPU was also shared by the Advocate-General *Manuel Campos Sánchez-Bordonain* his [opinion of 30 April 2019](#). The AG, went a step further, however, by concluding that – according to his view – only a judge or a court is capable of properly issuing an EAW. Prosecution services should only be entitled to issue EAWs in exceptional circumstances, e.g., in urgent cases, in accordance with the national law of a Member State. Restricting the competence to issue an EAW to judges/courts avoids verification of institutional and functional autonomy in each individual EAW case. In its judgments C-508/19 and C-82/19 PPU, the CJEU does not seem to draw this conclusion, even in comparison to the decision regarding the Court's finding in [case C-509/19](#) on the Lithuanian General Prosecution Service. This is mainly because, in the "German case," the CJEU focuses on whether prosecution services are exposed to the risk of being subject (directly or indirectly) to directions or instructions from the executive (such as ministers). In the "Lithuanian case," the CJEU does not fully exclude prosecution services from the concept of "issuing judicial authorities." This means that executing authorities will have to examine the status of the prosecution services in EAW cases and carry out individual assessments in the future. Therefore, uncertainties for legal practitioners executing EAWs will remain, which may not only delay surrender, but also trigger similar references.

Coming back to Germany: the ultimate question is whether the structure of the German public prosecution offices, with their embedding in the executive branch, must be overhauled. The abolition of external power for the ministers of justice to give instructions is a recurring request which has gained new momentum with the present CJEU judgment.

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