

CJEU Interprets Refusal Ground of Trials in absentia in the Context of Revocation of Suspended Convictions

Thomas Wahl

Courts are increasingly encountering the problem of whether the newly introduced Art. 4a of the FD EAW (which regulates the conditions under which a EAW can be refused if the person is not present in the “trial resulting in the decision”) applies to decisions taken during the execution phase of a custodial sentence.

In August 2017, the CJEU had occasion to define the term “trials resulting in the decision” in two cases: one in the context of appeal proceedings (*C-270/17 PPU (Tada Tupikas)*) and one in the context of handing down cumulative sentences (*C-271/17 PPU (Slawomir Andrzej Zdziaszek)*). Both cases were brought to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam) – the central court that handles the execution of all European Arrest Warrants in the Netherlands.

The *Rechtbank Amsterdam* requested a preliminary ruling anew from the CJEU (*C-571/17 PPU, Samet Ardic*). In the case at issue, the Dutch court had to deal with the execution of a European Arrest Warrant against Mr. Ardic with a view to executing two custodial sentences imposed by German courts. The peculiarity in the case was that the sentences had initially been suspended on probation, but the execution of the remainder of the sentences was ordered after Mr. Ardic persisted in infringing the prescribed conditions and evading the supervision and guidance of his probation officer as well as the supervision of the courts. Mr. Ardic did not appear at the proceedings resulting in the revocation decisions, but he was present during the main trial at which he was found guilty. The Amsterdam court now wanted to know whether the revocation decision constitutes a “trial resulting in the decision,” which would make Art. 4a of the FD EAW applicable and therefore open the possibility to refuse the EAW from Germany.

In its reply of 22 December 2017, the CJEU first points out that the concept as referred to in Art. 4a FD EAW must be given an autonomous and uniform interpretation within the European Union. It draws on the above-mentioned judgments in *Tupikas* and *Zdziaszek*.

It follows from these judgments that Art. 4a(1) FD EAW must be interpreted to mean that “the concept of ‘decision’ relates to the judicial decision or decisions concerning the criminal conviction of the interested person, namely the decision or decisions that definitively rule, after an assessment of the case in fact and in law, on the guilt of that person and, where relevant, on the custodial sentence imposed on him.”

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After referring to corresponding case law of the ECtHR on the applicability of Arts. 6 and 7 ECHR, the CJEU clarified that the refusal ground of Art. 4a FD EAW is not applicable to a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority that adopted it enjoyed some discretion in that regard.

The CJEU concluded that, in the present case, the decisions to revoke the suspension do not fall under one of these exceptions, because the intention was not to review the merits of the case.

In this context, the CJEU further noted that – if Art. 4a FD EAW should be applicable – a potential margin of discretion in relation to the revocation must refer to the level or the nature of the sentences imposed on the person concerned. In the present case, however, the German courts only enjoyed discretion as regards the revocation or maintenance of the suspension with additional conditions, but not the level or nature of the sentence itself.

The CJEU mainly underpinned these conclusions by referring to the “*effet utile*” of the new surrender system based on mutual recognition of judicial decisions and mutual trust in the EU. Furthermore, the CJEU pointed out that the conduct of the person convicted must be considered, in particular the fact that he did not comply with the conditions during the probationary period. Therefore, he cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject.

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