

ECJ Rules on Consequences of the Prosecutor's Lacking Independence for the Consent Procedure

Thomas Wahl

On 6 July 2023, the ECJ clarified the consequences to be drawn from its case law on the lacking independence of public prosecution services so that they cannot be recognised as "issuing judicial authority" within the meaning of Art. 6(1) of the Framework Decision on the European Arrest Warrant (FD EAW). The questions raised concerned the interpretation of the consent as an exception of the speciality principle in EAW cases (*Case C-142/22, OE v Minister for Justice and Equality*).

In the case at issue, OE opposed decisions by Irish courts to grant consent to a request by the Netherlands to prosecute OE for offences committed prior to his surrender other than those which provided the justification for the initial Dutch European arrest warrants. He argued that the initial EAWs were issued by Dutch public prosecutors who - due to their subordination to the executive - cannot be regarded as "issuing judicial authority" in accordance with the requirements arising from FD EAW and the respective CJEU case law (→ [eucrim 1/2019, 31-33](#) and [eucrim 4/2020, 292-293](#)). According to OE, this fact also precludes the request for consent in the framework of Art. 27(3) lit. g) and (4) FD EAW.

The referring Supreme Court of Ireland is uncertain whether OE can raise this argument and argued that the legal classification of the relationship between the surrender procedure and the consent procedure decides on whether the Irish courts must apply the principle of estoppel.

The ECJ decided that the consent decision has a subject matter that is specific to it. Therefore, the examination by the executing authority is separate from and independent of the examination prompted by the European arrest warrant. The ECJ concludes that Art. 27(3) lit. g) and (4) FD EAW must be interpreted as meaning that the fact that an EAW on the basis of which a person has been the subject of a surrender decision has been issued by an authority, which did not constitute an "issuing judicial authority" within the meaning of Art. 6(1) FD EAW, does not preclude the executing judicial authority from subsequently giving its consent to that person being prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his/her surrender other than that for which he/she was surrendered.

AUTHOR

Thomas Wahl

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

ISSN: 1862-6947

<https://eucrim.eu>



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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the [European Anti-Fraud Office \(OLAF\)](#).



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