Council of the
European Union

Brussels, 12 June 2019
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9974/19

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COPEN 248
EUROJUST 110
EJN 52

NOTE

From:	Presidency
To:	Delegations
Subject:	Judgments of the CJEU of 27 May 2019 in joined cases C-508/18 and C-82/19 PPU and in case C-509/18 - public prosecutors offices acting as judicial authorities - Exchange of views on the follow-up = Paper by the Presidency

At the COPEN (FOP) meeting on 21 May 2019, delegations discussed the conclusions of Advocate General Campos Sánchez-Bordona of 30 April 2019 in joined cases C-508/18 and C-82/19 PPU, and in case C-509/19, concerning public prosecutor offices acting as 'issuing judicial authority' in EAW cases (see 9385/19, and the outcome in 9968/19).

On 27 May 2019, the CJEU rendered its judgment in these cases (see for joined cases C-508/18 (OG) and C-82/19 PPU (PI) the judgment here) and for case C-509/18 (PF) the judgment here).

In short, the CJEU followed partially the AG (see option 'B' in 9385/19), by deciding that whether or not public prosecutor offices can act as an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD, depends on the fact whether, in the light i.a. of the legal system of the Member State concerned, such offices can be considered as *independent* from the executive in connection with the issuing of a European arrest warrant. Hence, there is no unifom answer: it depends from Member State to Member State.

Following the judgment, several actions were taken, i.a. the following:

- JHA Counsellors Member States had informal exchanges by electronic mail about action to be taken, in particular regarding requested persons that were in custody on the basis of an 'invalid' EAW.
- Some Member States issued special notes, e.g. about their view concerning the impact of the judgments for their legal order. These notes were exchanged via the JHA Counsellors, and/or distributed via the Council secretariat (see WK 6666/2019) or via the EJN (through an e-mail to contact points and notices on the EJN website[1]); the notes available to the General Secretariat are set out in the Annex to this note.
- Eurojust distributed a questionnaire and collected the replies thereto (see 10016/19).
- The Presidency proposed having a meeting to discuss this matter at short notice, but Member States indicated that they preferred firstly reflecting on this issue and then discussing it at the COPEN meeting on 19 June 2019.

At the COPEN meeting that is scheduled for 19 June, the Presidency suggests having an exchange of views on two issues:

1) **Impact of the judgments of 27 May.** What is the concrete impact of the judgments for your Member State, both as issuing Member State and as executing Member State? Have the judgments given rise to any problems (e.g. how many requested persons have been released)? What concrete action concerning pending EAW cases, if any, have you taken following the judgments (e.g. pending EAWs as a basis for provisional arrests), and/or which action do you still envisage to take (e.g. legislative changes)? Is there any assistance that you require in this respect from other parties, i.a. from other Member States, from the Commission, from Eurojust/EJN, from the Presidency or the General Secretariat?

[1] See here.

2) **Learning lessons.** As indicated above, subsequently to the judgments, action was taken by several actors. It appeared, however, that there was no coordination of the various forms of action at the EU level. Moreover, information sharing was not perfect, and therefore there was a risk that double work would be carried out.

It is not excluded that in the future the CJEU will again render a judgment that has a direct impact on cooperation in criminal matters. Therefore, the Presidency wonders if we can learn from the experience of the last weeks to better address such situations in the future.

In this respect, the Presidency would appreciate obtaining the views of delegations on how such situation could best be handled: would it be useful to determine an institution/agency that is responsible ('in the lead') for coordination and information sharing (e.g. Eurojust/EJN, the Commission, the Presidency/Secetariat, ..)? What else could be done to better address such situations in the future (e.g. a request to the CJEU to limit temporal effects[2])?

In any case, the Presidency considers it useful that information sharing between all actors concerned (notably Member States, Eurojust/EJN, the Commission, the Presidency/Secretariat,) be further improved, so as to facilitate operations and avoid any double work.

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[2] For example, as proposed by the parties in Case C-477/16 PPU *Kovalkovas* and in Case C-452/16 PPU *Poltorak.*

ANNEX

Notes distributed by Member States

(appearance in the order in which the notes were received by the General Secretariat)

1. Germany
2. Italy
3. Sweden
4. Finland
5. Austria

GERMANY

Dear Mr. Chair,

According to the European Court of Justice's judgement of 27 May 2019 in the joined cases C-508/18 and C-82/19 PPU, the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including public prosecutors' offices of a Member State that are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European Arrest Warrant.

Therefore, Germany will adjust the proceedings to issue a European Arrest Warrant. From now on, European Arrest Warrants will only be issued by the courts. This can be achieved without changing the existing laws. We have already informed the courts and public prosecutors about the ECJ judgement.

Time will be needed in order to update European Arrest Warrants that have already been issued. We would therefore kindly ask, and suggest that the Member States decide, whether an existing European Arrest Warrant that has been issued and signed by a German prosecutor could be accepted as grounds for keeping a person in detention according to Article 12 of Council Framework Decision 2002/584/JHA. In such cases, the German court responsible for issuing a European Arrest Warrant would be required to assess within a very short time-frame whether the requirements for issuing a warrant are fulfilled, and where applicable, forward the warrant immediately to the competent authority in the executing State.

Germany will also review the notification on Art. 6 (1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

For the legal assessment of incoming European Arrest Warrants and to get an overview which other Member States might be affected by the ECJ's judgement, we kindly ask, if you could circulate the answers given by the Member States to the discussion paper by the Presidency of 16 May, 2019 (9385/19). For this purpose, it would be helpful to learn which public prosecutors' offices of other Member States are independent or not within the meaning of the ECJ case-law.

Kind regards,

Ralf Riegel

ITALY

Rectangular Snip

Ministero della Giustizia

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The independence of the Italian Public Prosecutors

The Italian Constitution excludes Public Prosecutors from the sphere of influence of the executive power and places them in their own right in the sphere of independence of the Judicial authority, that is safeguarded by a Superior Council of the Judiciary, whose members are elected to the extent of two thirds by judges, and that has competence in the field of appointments, promotions, transfers and disciplinary proceedings.

Under Article 104 of the Constitution "the judiciary is an autonomous and independent order vis a vis any other power".

As a result Public Prosecutors have not only been placed out of the dependence of the Minister of Justice, but they have also obtained the same guarantees as the judges responsible for giving rulings (with whom they share the same career) that protect their professional position from any intrusion of the executive power.

In Italy, in particular, public prosecutors are judges included in the judicial order and participate in the unified culture of jurisdiction, in the sense that they belong to the same order, the judiciary, of judges and as such they are and must be fully independent.

The judges attached to a Public Prosecutor's Office enjoy maximum independence with regard to their status, therefore the recruitments, disciplinary proceedings, transfers and promotions concerning them are decided by the Supreme Council of the Judiciary (Article 105 of the Constitution); there are irremovable from their office (Article 107 of the Constitution); they are appointed after a public competition (Article 106, paragraph 1 of the Constitution). The functions performed by public prosecutors are encapsulated in the judicial order; they ensure compliance with the laws, prompt and regular administration of justice; protection of the rights of the State, legal persons and incapacitated persons; they promote repression of offences by carrying out the necessary investigations to establish whether requesting committal for trial or that the case be dismissed; they prosecute offences when investigations evidence elements capable to support charges in the trial; they enforce final judgments and any other decision made by judges as provided for by the law.

In particular, in criminal proceedings Public Prosecutors perform the function of the public party by representing the State's general interest and, under Article 112 of the Constitution, have an obligation to initiate public prosecution. From this principle it follows that public prosecution cannot be subject to criteria of political opportunity, or submitted to vetoes or directives adopted by the Government or the Parliament and that the body in charge of public prosecution, public prosecutors, is itself as independent vis a vis political conditioning as the judges responsible for giving rulings.

By virtue of their position, Public Prosecutors have also a duty of procedural loyalty; actually they must not limit themselves to seek evidence supporting the prosecution's reconstruction, but, based on 358 of the Code of Criminal Procedure, they must carry out checks on facts and circumstances in favour of the persons under investigation; therefore they cannot refuse to carry out investigations if the latter lead to establishing facts in favour of the person under investigation, they must file all the results of investigations in accordance with the deadlines provided for by the law and in any case at the same time as the service of the notice that investigations are concluded under Article 415 bis of the Code of Criminal Procedure.

At the hearing public prosecutors are fully autonomous in the performing of their functions.

Therefore the constitutional scheme has fully implemented the principle of separation of powers.

The Judicial Authority has been instituted as a power of guarantee, and has been provided with strong guarantees that allow its proper function to be performed: ensuring effective supervision of legality over the exercise of powers (both public and private ones) and therefore the rule of law within the framework of the State of law.

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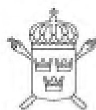

SWEDISH PROSECUTION AUTHORITY
Legal Department
Division for International Judicial Cooperation

Page 1 (2)

Date
2019-05-29

Temporary Deputy Prosecutor-General Marie-Louise Ollén

Certification that a Swedish prosecutor is a judicial authority in accordance with Article 6.1 of the framework decision concerning a European arrest warrant and surrender between member states

A prosecutor's independence

Chapter 11 Section 3 of the Instrument of Government (the Constitution of Sweden) states that no public authority (government) nor the Swedish parliament (Riksdag) may influence or determine how an authority shall decide an individual case, nor how a rule of law is to be applied.

Thus, a prosecutor is completely independent and free to make his or her own decisions.

Nor is a prosecutor's head or the authority itself permitted to issue directives on how a matter is to be handled or what is to be decided.

In Sweden, the role of the prosecutor has been devised so that the prosecutor has a central and independent role throughout the investigation process and legal proceedings in court. The prosecutor's independence is especially important with regard to the leading of criminal investigations and the taking of judicial decisions. It is the prosecutor, not the authority where he or she is employed, who takes decisions regarding whether legal proceedings are to be taken. It is the prosecutor who participates in court proceedings. The role of prosecutor is thereby exerted by an identifiable person with a personal responsibility.

A prosecutor has the right to decide whether a suspect is to be detained. The detaining of a person must be reported to a court within three days in order for the detention to be examined.

Thus a Swedish Prosecutor is not exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue a European arrest warrant. This means that the European Court of Justice´s judgments of 27 May 2019 in the cases C-508/18, 509/18 and C-82/19 does not affect the Swedish prosecutor's competence to issue European Arrest Warrant.

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The basis for the European arrest warrant is a court decision on detention.

In Sweden, a European arrest warrant for prosecution for a crime is not issued until after a detention order has been decided by a court. In order to do that, the court must have assessed that the person is suspected of the crime upon probable cause (*sannolika skäl*).

Once the detention hearing has been held and the detention order has been decided by the court, the prosecutor can issue a European arrest warrant.

A detention order can be appealed without restriction on time at the request of the suspect or his/her legal representative. Thus, it is possible that a detention order can be examined at the same time as a surrender process is underway in the executing country.

The prosecutor has a duty to consider the principle of proportionality and to continually examine whether an issued European arrest warrant is needed. If the degree of suspicion regarding the suspect decreases, the prosecutor handling the case is obliged to cancel the detention and withdraw the European arrest warrant.

When it comes to the prosecutor's attention that the wanted person has been arrested and the grounds for detention still exist, the prosecutor must examine whether the issued European arrest warrant is still valid. If the European arrest warrant is to be withdrawn, the foreign executing authority must be informed immediately. After that, the wanted person must be released immediately (by the executing foreign authority).

Marie-Louise Ollén
Temporary Deputy Prosecutor-General

FINLAND

OFFICE OF THE PROSECUTOR GENERAL

Memorandum 1 (1)

29.5.2019

To whom it may concern

Reference: Court of Justice of the European Union Judgments in Joined Cases C-508/18 and C-82/19

In Finland, under Finnish law, prosecutor always decides on the issuing of EAWs.

According to the Act on the Prosecution Service (439/2011) prosecutors are autonomous and independent in the consideration of charges and any measure related thereto. It is the duty of a prosecutor is to impartially secure criminal liability in a case under his/her consideration in a manner consistent with the legal safeguards of the parties and the public interest.

Due to the autonomous and independent status of the prosecutor he/she may not be directed or instructed in a specific case or otherwise by the executive, such as a Minister for Justice or the police in connection with deciding to issue an EAW.

The prosecution service is headed by the Prosecutor General, who is appointed by the President of the Republic. The status of the Prosecutor General is laid down in the the Constitution of Finland (731/1999). The Prosecutor General serves as the supreme prosecutor and supervisor of the prosecutors. The Prosecutor General may take over a case from a subordinate prosecutor or assign a subordinate prosecutor to a case where the Prosecutor General has decided a charge is to be brought.

A prosecutor may issue an EAW for prosecution only on the basis of a national arrest warrant issued by a court. The Court may remand a person whose surrender to Finland is to be requested if there are grounds to suspect that he/she will not arrive voluntarily to Finland for prosecution. Court's decision is possible only if there are probable grounds to suspect the requested person of a crime. The principle of proportionality will be applied in the consideration of the coercive measures.

The requested person may file a complaint to the Court of Appeal against the decision by which he or she has been remanded. The complaint is not subject to any time limits and may be filed in any stage of the EAW proceedings. If the Court of Appeal annuls the decision on remand the EAW will consequently be cancelled by the issuing prosecutor.

Once the requested person is surrendered to Finland the Court will hold a new remand hearing without delay and in any case not later than four days from the time when the requested person arrived in Finland.

Prosecutor has according to the Coersive Measures Act the right to arrest a person in Finland. In such a case, if necessary, a request for the person to be remanded must be forwarded to the competent court the third day before noon counted from the arrest.

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AUSTRIA

Law

Under Austrian legislation (Section 29 of the Federal law on Judicial Cooperation in Criminal Matters with the Member States of the European Union, EU-JZG), if there is reason to initiate the tracing of a person in order to arrest him or her in at least one of the Member States, a European Arrest Warrant is ordered

a) (exceptionally: after the formal indictment has been filed, i.e. during the trial phase) by the **court** on application of the office of public prosecution, or
b) (in most cases, i.e. during investigations) by the **public prosecutor**, but the European Arrest Warrant must be **authorized by a court**.

The authorization by the court mentioned under b) is a prerequisite for the European Arrest Warrant to have effect. The court is the body taking the ultimate decision if the EAW is issued.

When assessing if the legal requirements are met, the court has to apply the rules enshrined in the Austrian Code of Criminal Procedure (CCP – StPO), namely on arrest (sect. 170 – 172a) and on tracing of persons (sect. 167 – 169) (because these are the national instruments underlying the issuing of a European Arrest Warrant as foreseen in sect. 29 EU-JZG). Sect. 170 para. 3 CCP explicitly holds that the arrest is not permissible if it is disproportionate to the significance of the matter; this is a special form of the general principle of proportionality, underlying the criminal procedure as a whole (sect. 5 CCP). Another general rule is that a court, when deciding on any coercive measure, has to assess all factual and legal reasons; as long as the court is not satisfied that those are met, it may instruct the investigation authorities to conduct further investigations or can conduct investigations ex officio (sect. 105 CCP).

To sum up, the court is entitled to fully assess if the legal requirements, including proportionality, to issue a European Arrest Warrant are met.

The Austrian situation (under b) therefore corresponds to the one described by the ECJ in its judgment of 27 May 2019, C-508/18, as follows:

75 In addition, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

We therefore consider that European Arrest Warrants issued by an Austrian public prosecutor and (as demonstrated, always) authorized by a court are to be regarded as issued by a "judicial authority" in the sense of Art. 6 para. 1 of the Framework Decision 2002/584/JHA, as interpreted by the ECJ in its judgments of 27 may 2019.

Practical aspects

Up to now, the fact that European Arrest Warrants ordered by a public prosecutor always, before being issued, have been authorized by a court, is not reflected in the Certificate.

The Austrian Ministry of Justice has issued, on june 6th, a decree asking the prosecution authorities to complement the "Certificate" (= the European Arrest Warrant) with an Annex containing the authorisation by the court.