



**EUROJUST**

# Case-law by the Court of Justice of the European Union on the European Arrest Warrant

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*Criminal justice across borders*

## Executive summary

This document provides an overview of the case-law of the Court of Justice of the European Union (CJEU) with regard to the application of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (EAW FD).

The **2021 edition of Eurojust's overview on the case-law of the CJEU on the European arrest warrant (EAW) is up to date as of 15 March 2021**. Compared with the previous (2020) edition, it contains nine additional judgments, totalling 55 judgments for the period 2007–2021. Depending on the number of upcoming judgments, the next update of this document will be published still in 2021 or in 2022.

The case-law overview contains summaries of the CJEU's judgments categorised according to a set of important keywords that largely reflect the structure of the EAW FD. A table of keywords and a chronological list of judgments is also provided at the beginning of the document.

The overview covers the following main topics. Recent developments since the last update are mentioned per topic.

- **Validity of the EAW FD.** In 2021, the CJEU upheld the validity of the EAW FD dismissing challenges based on fundamental rights grounds (Case C-649/19, *Spetsializirana prokuratura (Déclaration des droits)*).
- **Admissibility of a request for a preliminary ruling by an issuing judicial authority.** In 2021, the CJEU accepted that the issuing judicial authority can request a preliminary ruling where the EAW has already been annulled, with a view to adopting a new EAW (*Spetsializirana prokuratura (Déclaration des droits)*).
- **Content and validity of the EAW.** In 2020, the CJEU also extended its case-law on the concept of issuing judicial authority within the meaning of Article 6(1) EAW FD to the concept of 'executing judicial authority' within the meaning of Articles 6(2), 27(3)(g) and 27(4) EAW FD (*Openbaar Ministerie (Faux en écritures)*). The CJEU also ruled that systemic or general deficiencies affecting the independence of the issuing Member State's judiciary are not sufficient, on their own, to conclude that all the courts of the issuing Member State fail to fall within the concept of 'issuing judicial authority' (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*). In 2021, the CJEU further clarified the meaning of the concept 'national arrest warrant or any other enforceable judicial decision having the same effect' (*MM*). As to the requirements of effective judicial protection in relation to an EAW for the purposes of prosecution, the CJEU ruled that they presuppose that either the EAW or the national arrest warrant on which it is based be subject to judicial review by a court in the issuing Member State prior to the surrender of the requested person (*PI*).
- **Obligation to execute an EAW.**
- **Scope of the EAW.**
- **Human rights scrutiny.** In 2020, the CJEU further clarified the two-step assessment in relation to the fundamental right to an independent tribunal. The CJEU also recalled that existence of systemic or generalised deficiencies concerning judicial independence in an issuing Member State does not justify in itself the executing judicial authority refusing to execute any EAW issued by a judicial authority of that Member State (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*).



- **Grounds for refusal.** In 2020, the CJEU clarified the meaning of Article 4a(1) EAW FD related to *in absentia* judgments (*Generalstaatsanwaltschaft Hamburg*).
- **Guarantees.**
- **Requests for additional information.**
- **Time limits.**
- **Effects of the surrender.** In 2020, the CJEU further clarified the meaning of the speciality rule under Article 27 EAW FD (*Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*).
- **Transitional regime and relations to other instruments.**
- **Extradition of EU citizens to third states.** In 2020, the CJEU extended its '*Petruhhin*' case-law to extradition requests concerning nationals of a European Free Trade Association (EFTA) State (*Ruska Federacija*). It also further refined the requirements surrounding the consultation mechanism between the requested State and the Member State of nationality (*Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*).

The index and summaries of judgments are not exhaustive and are to be used only for reference and as a supplementary tool for practitioners. They have been prepared by Eurojust and do not bind the CJEU. The summaries contain links to the full texts of the judgments of the CJEU that can be found, in all EU official languages, on the [CJEU's website](#). Where relevant, reference is made also to the Charter of Fundamental Rights of the European Union (the Charter), the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR).



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**Index of keywords with reference to relevant judgments**

<b>Keyword</b>	<b>Articles</b>	<b>Case title</b>	<b>Case number</b>
Additional information	Article 15(2) EAW FD	Mantello	C-261/09
		Melvin West	C-192/12 PPU
		Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		Bob-Dogi	C-241/15
		Tupikas	C-270/17 PPU
		Piotrowski	C-367/16
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		Minister for Justice and Equality (Deficiencies in the System of Justice)	C-216/18 PPU
		Dorobantu	C-128/18
Admissibility	Article 267 TFEU	AY	C-268/17
		Spetsializirana prokuratura (Déclaration des droits)	C-649/19
Appeal with suspensive effect, <i>see also</i> time limits		Jeremy F	C-168/13 PPU
Arrest warrant (content and form of the EAW)	Article 8(1) EAW FD	Bob-Dogi	C-241/15
		Özçelik	C-453/16 PPU
		MM	C-414/20 PPU
		IK	C-551/18 PPU
		PI	C-648/20 PPU
Citizenship, <i>see</i> EU citizenship			
Consent, <i>see also</i> subsequent surrender, <i>see also</i> speciality rule		Jeremy F	C-168/13 PPU
Convention (EU) on Extradition (1996)	Articles 31 and 32 EAW FD	Santesteban Goicoechea	C-296/08 PPU
Custody, <i>see</i> detention			
Detention	Articles 12 and 26 EAW FD	Lanigan	C-237/15 PPU
		JZ	C-294/16 PPU
Double criminality	Articles 2(2), 2(4) and 4.1 EAW FD	Advocaten voor de Wereld	C-303/05
		A	C-463/15 PPU
		X	C-717/18
Equality (principle of)		Advocaten voor de Wereld	C-303/05
EU citizenship and free movement and Extradition	Articles 18 and 21 TFEU and	Petruhhin	C-182/15
		Pisciotti	C-191/16
		Raugevicius	C-247/17
		Ruska Federacija	C-897/19
		Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)	C-398/19



Fundamental rights scrutiny	— Right to be heard (Articles 47 and 48 Charter)	Radu	C-396/11
	— Member States' constitutions (Article 53 Charter)	Melloni	C-399/11
	— Prohibition of inhuman or degrading treatment (Article 4 Charter)	Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		Dorobantu	C-128/18
	— Right to an independent tribunal, right to a fair trial (Article 47(2) Charter)	Minister for Justice and Equality (Deficiencies in the System of Justice)	C-216/18 PPU
Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)		C-354/20 PPU and C-412/20 PPU	
Fundamental rights	— Right to liberty and security (Article 6 Charter)	Lanigan	C-237/15 PPU
		JZ	C-294/16 PPU
		TC	C-492/18 PPU
	— Right to effective judicial protection (Article 47 Charter)	Spetsializirana prokuratura (Déclaration des droits)	C-649/19
		MM	C-414/20 PPU
		PI	C-648/20 PPU
Guarantees	Article 5 EAW FD	IB	C-306/09
		SF	C-314/18
<i>In absentia</i>	Article 4a(1) EAW FD	IB	C-306/09
		Melloni	C-399/11
		Dworzecki	C-108/16 PPU
		Tupikas	C-270/17 PPU
		Zdziaszek	C-271/17 PPU
		Ardic	C-571/17 PPU
		Generalstaatsanwaltschaft Hamburg	C-416/20 PPU
Judicial authority (issuing) and effective judicial protection	Article 6(1) EAW FD	Poltorak	C-452/16 PPU
		Kovalkovas	C-477/16 PPU
		OG and PI	C-508/18 PPU and C-82/19 PPU
		PF	C-509/18
		JR and YC	C-566/19 PPU and C-626/19 PPU
		XD	C-625/19 PPU
		ZB	C-627/19 PPU



		MM	C-414/20
Judicial authority (executing)	Article 6(2) EAW FD	Openbaar Ministerie (Faux en écritures))	C-510/19
Judicial decision, <i>see also</i> arrest warrant	Article 1(1) EAW FD	Poltorak	C-452/16 PPU
		Kovalkovas	C-477/16 PPU
		NJ	C-489/19 PPU
	Article 8(1)(c) EAW FD	Özçelik	C-453/16 PPU
		PI	C-648/20 PPU
Legality (principle of)		Advocaten voor de Wereld	C-303/05
Minors	Article 3(3) EAW FD	Piotrowski	C-367/16
<i>Ne bis in idem</i>	Article 3(2) EAW FD	Mantello	C-261/09
	Article 4(3) EAW FD	AY	C-268/17
Non-discrimination (principle of) Non-discrimination on ground of nationality	Article 18 TFEU	Advocaten voor de Wereld	C-303/05
		Wolzenburg	C-123/08
		Lopes Da Silva Jorge	C-42/11
		Popławski I	C-579/15
Offence other than for which the person was surrendered, <i>see</i> speciality rule			
Prison conditions, <i>see</i> fundamental rights (prohibition of inhuman or degrading treatment)			
Resident	Article 4(6) EAW FD	Kozłowski	C-66/08
		Wolzenburg	C-123/08
		Lopes Da Silva Jorge	C-42/11
		Popławski I	C-579/15
		Sut	C-514/17
		Popławski II	C-573/17
Speciality rule	Article 27 EAW FD	Leymann and Pustovarov	C-388/08
		Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)	C-195/20 PPU
Staying in	Article 4(6) EAW FD	Kozłowski	C-66/08
		Lopes Da Silva Jorge	C-42/11
Subsequent surrender	Article 28 EAW FD	Melvin West	C-192/12 PPU
Time limits	Article 17 EAW FD	Jeremy F	C-168/13 PPU
		Lanigan	C-237/15 PPU
		Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		Piotrowski	C-367/16
		Tupikas	C-270/17 PPU
		Zdziaszek	C-271/17 PPU
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		TC	C-492/18 PPU
		Dorobantu	C-128/18



	Article 23 EAW FD	Vilkas	C-640/15
Withdrawal	Article 50 TEU	RO	C-327/18 PPU

## Chronological list of judgments

1. Case C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.
2. Case C-66/08, *Kozłowski*, Judgment of 17 July 2008.
3. Case C-296/08 PPU, *Santesteban Goicoechea*, Judgment of 12 August 2008.
4. Case C-388/08, *Leymann and Pustovarov*, Judgment of 1 December 2008.
5. Case C-123/08, *Wolzenburg*, Judgment of 6 October 2009.
6. Case C-306/09, *IB*, Judgment of 21 October 2010.
7. Case C-261/09, *Mantello*, Judgment of 16 November 2010.
8. Case C-192/12 PPU, *Melvin West*, Judgment of 28 June 2012.
9. Case C-42/11, *Lopes Da Silva Jorge*, Judgment of 5 September 2012.
10. Case C-396/11, *Radu*, Judgment of 29 January 2013.
11. Case C-399/11, *Melloni*, Judgment of 26 February 2013.
12. Case C-168/13 PPU, *Jeremy F*, Judgment of 30 May 2013.
13. Case C-237/15 PPU, *Lanigan*, Judgment of 16 July 2015.
14. Case C-463/15 PPU, *A*, Order of 25 September 2015.
15. Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016.
16. Case C-108/16 PPU, *Dworzecki*, Judgment of 24 May 2016.
17. Case C-241/15, *Bob-Dogi*, Judgment of 1 June 2016.
18. Case C-294/16 PPU, *JZ*, Judgment of 28 July 2016.
19. Case C-182/15, *Petruhhin*, Judgment of 6 September 2016.
20. Case C-452/16 PPU, *Poltorak*, Judgment of 10 November 2016.
21. Case C-453/16 PPU, *Özcelik*, Judgment of 10 November 2016.
22. Case C-477/16 PPU, *Kovalkovas*, Judgment of 10 November 2016.
23. Case C-640/15, *Vilkas*, Judgment of 25 January 2017.
24. Case C-579/15, *Poptawski*, Judgment of 29 June 2017 (*Poptawski I*).
25. Case C-270/17 PPU, *Tupikas*, Judgment of 10 August 2017.
26. Case C-271/17 PPU, *Zdziaszek*, Judgment of 10 August 2017.
27. Case C-571/17 PPU, *Ardic*, Judgment of 22 December 2017.
28. Case C-367/16, *Piotrowski*, Judgment of 23 January 2018.
29. Case C-191/16, *Pisciotti*, Judgment of 10 April 2018.
30. Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, Judgment of 25 July 2018.
31. Case C-220/18 PPU, *ML (Conditions of detention in Hungary)*, Judgment of 25 July 2018.
32. Case C-268/17, *AY*, Judgment of 25 July 2018.
33. Case C-327/18 PPU, *RO*, Judgment of 19 September 2018.
34. Case C-247/17, *Raugevicius*, Judgment of 13 November 2018.
35. Case C-551/18 PPU, *IK*, Judgment of 6 December 2018.
36. Case C-514/17, *Sut*, Judgment of 13 December 2018.
37. Case C-492/18 PPU, *TC*, Judgment of 12 February 2019.
38. Case C-573/17, *Poptawski*, Judgment of 24 June 2019 (*Poptawski II*).
39. Joined Cases C-508/18, *OG*, and C-82/19 PPU, *PI*, Judgment of 27 May 2019.
40. Case C-509/18, *PF*, Judgment of 27 May 2019.
41. Case C-489/19 PPU, *NJ*, Judgment of 9 October 2019.
42. Case C-128/18, *Dorobantu*, Judgment of 15 October 2019.
43. Joined Cases C-566/19 PPU, *JR*, and C-626/19 PPU, *YC*, Judgment of 12 December 2019.



44. Case C-625/19 PPU, ***XD***, Judgment of 12 December 2019.
45. Case C-627/19 PPU, ***ZB***, Judgment of 12 December 2019.
46. Case C-717/18, ***X***, Judgment of 3 March 2020.
47. Case C-314/18, ***SF***, Judgment of 11 March 2020.
48. Case C-897/19, ***Ruska Federacija***, Judgment of 2 April 2020.
49. Case C-195/20 PPO, ***Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)***, Judgment of 24 September 2020.
50. Case C-510/19, ***Openbaar Ministerie (Faux en écritures)***, Judgment of 24 November 2020.
51. Case C-416/20 PPU, ***Generalstaatsanwaltschaft Hamburg***, Judgment of 17 December 2020.
52. Case C-398/19, ***Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)***, Judgment of 17 December 2020.
53. Joined Cases C-354/20 PPU and C-412/20 PPU, ***Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)***, Judgment of 17 December 2020.
54. Case C-414/20 PPU, ***MM***, Judgment of 13 January 2021.
55. Case C-649/19, ***Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021.
56. [Case C-648/20 PPU, \*\*\*PI\*\*\*, Judgment of 10 March 2021.](#)

A number of cases dealing with the EAW FD, including the following cases, are currently pending before the CJEU and will be included in the next update, if they are available by then.

1. Case C-488/19, ***JR***. Request for a preliminary ruling from the High Court (Ireland) lodged on 26 June 2019. The questions referred relate to the interpretation of Article 4(7)(b) EAW FD (ground for optional non-execution where the offence has been committed outside the territory of the issuing Member State). Opinion of Advocate General Kokott of 17 September 2020.
2. Case C-78/20, ***Generálna prokuratura Slovenskej republiky***. Request for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Slovakia) lodged on 14 February 2020. The questions referred relate to the interpretation of Article 6(1) and Article 15(2) EAW FD (notion of judicial authority and additional information).
3. Case C-203/20, ***AB and Others***. Request for a preliminary ruling from the Okresný súd Bratislava III (Slovakia) lodged on 11 May 2020. The questions referred relate to the interpretation of the principle of *ne bis in idem* in relation to the possibility of issuing an EAW.
4. Case C-206/20, ***Prosecutor of the regional prosecutor's office in Ruse, Bulgaria***. Request for a preliminary ruling from the High Court of Justice (United Kingdom) lodged on 24 July 2020. The questions referred relate to the interpretation of Article 6(1) EAW FD (notion of judicial authority).
5. Case C-665/20 PPU, ***X (Mandat d'arrêt européen – Ne bis in idem)***. Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) lodged on 7 December 2020. The questions referred relate to the interpretation of Article 4(5) EAW FD (principle of *ne bis in idem*).

## 1. Validity of the EAW FD

In 2007, the validity of the EAW FD was challenged in *Advocaten voor de Wereld* on two grounds, namely the legal basis and the principle of equality and non-discrimination. The CJEU dismissed both arguments and upheld the validity of the EAW FD. Next, the CJEU upheld the validity of the EAW FD in 2021 in *Spetsializirana prokuratura (Déclaration des droits)*, dismissing challenges brought on a fundamental rights ground, namely of an alleged infringement with the right to information of the accused.

### Case C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.

- See also *infra* 5 (on the scope of the EAW FD).
- **Facts.** In 2007, a non-profit organisation, *Advocaten voor de Wereld*, brought an action before the Belgian Constitutional Court seeking the annulment of the Belgian law transposing the EAW FD. The non-profit organisation claimed, first of all, that by adopting a ‘framework decision’ the European legislature had not chosen the correct legal instrument, as it should have chosen a ‘convention’. Secondly, it argued that, insofar as the new law dispensed with the verification of the double criminality requirement for the so-called list offences (Article 2(2) EAW FD), it violated the principles of legality, equality and non-discrimination. The Constitutional Court considered that some of the grounds put forward by the non-profit organisation related to the validity of the EAW FD itself and decided to refer two questions to the CJEU.
- **Main question.** Can the validity of the EAW FD be questioned in the light of (i) the choice of the legal instrument and/or (ii) the rule that dispenses with the verification of the double criminality requirement for the list offences (Article 2(2) EAW FD)?
- **CJEU’s reply. The examination of the questions submitted has revealed no factor capable of affecting the validity of the EAW FD.** The CJEU’s main arguments follow.
  - **Correct legal instrument.** Under the relevant provisions of the former TEU, the Council had discretion to choose among several legal instruments, including a framework decision (paras 28–43).
  - **Article 2(2) EAW FD does not breach the principle of legality.** The aim of the EAW FD is not to harmonise the legislation of Member States with regard to the criminal offences in respect of their constituent elements or of the penalties that they detract. The actual definition of the offences and the penalties applicable are those that follow from the law of the issuing Member State (para 52).
  - **Article 2(2) EAW FD does not breach the principle of equality and non-discrimination.** The Council was able to form the view that the categories of offences listed in Article 2(2) EAW FD are among those the seriousness of which, in terms of adversely affecting public order and public safety, justifies dispensing with the verification of double criminality (para 57). The distinction between listed and non-listed offences is thus objectively justified (para 58). Moreover, it was not the objective of the EAW FD to harmonise the substantive criminal law of the Member States. The former TEU did not make the application of the EAW conditional on harmonisation of the criminal laws of the Member States within the area of the offences in question (para 59).

### Case C-649-19, *Spetsializirana prokuratura (Déclaration des droits)*, Judgment of 28 January 2021.

- See also *infra* 2 (on admissibility of a request for preliminary ruling by the issuing authority).
- **Facts.** The Special Public Prosecutor's Office of Bulgaria brought criminal proceedings against IR for participation in a criminal organisation for the purpose of committing tax offences. At pre-trial stage, IR was informed only of some of his rights as an accused person. At trial stage, IR could not be found. The trial court, following proceedings in which IR did not take part and was represented by a court-appointed lawyer, issued a national arrest warrant against him. An EAW was then issued against him based on that national arrest warrant. Harbours doubts as to whether that EAW was compatible with EU law on the ground that IR was not informed of all the rights he enjoyed under Bulgaria law, the referring court annulled it. Since it is now necessary to issue a new EAW against IR, the referring court seeks clarification from the CJEU as to the information to be attached to the EAW to ensure compliance with Directive 2012/13/EU. The referring court therefore asks firstly whether the rights under Articles 4, 6(7) and 7(1) of Directive 2012/13/EU are applicable in EAW proceedings. If the answer to the first question is negative, the referring court questions the validity of the EAW FD in relation to Articles 6 and 47 of the Charter.
- **Main questions.** Do the rights of an accused person under Article 4(3) (right to be provided with a Letter of Rights), Article 6(2) (Right to be informed of the reasons for the arrest) and Article 7(1) (Right to access the essential documents of the case file) of Directive 2012/13 apply to an accused person who has been arrested on the basis of an EAW? If there are no other legal means for safeguarding the rights of a person arrested on the basis of an EAW under Article 4(3), Article 6(2) and Article 7(1) of Directive 2012/13 is Framework Decision 2002/584 valid?
- **CJEU's reply.** **The examination of the questions submitted has revealed no factor capable of affecting the validity of the EAW FD in light of Articles 6 and 47 of the Charter.** The CJEU's main arguments follow.
  - **Article 4(3), Article 6(2) and Article 7(1) of Directive 2012/13 do not apply to an accused person who has been arrested on the basis of an EAW.** These provisions apply to 'suspect or accused persons that are arrested or detained' and the context of those provisions and the objective of Directive 2012/13 suggest that persons arrested in execution of an EAW do not fall within that notion (paras 46 and 47):
    - The rights conferred to persons arrested in execution of an EAW are expressly governed by Article 5 of Directive 2012/12, which confers on them the right to be provided with a Letter of Rights concerning information on their rights according to the law implementing the EAW FD in the executing Member State. For that purpose, an indicative model letter is set out in Annex II, that is different from that under Article 4 set out in Annex I (paras 48–52);
    - Recital 21 of that Directive clarifies that said notion refers to situations in which there is a deprivation of liberty within the meaning of Article 5(1)(c) ECHR, concerning the lawful arrest or detention of a person effected for the purpose of bringing him or her before the competent legal authority on reasonable suspicion of having committed an offence. To the contrary, the arrest of a person in execution of an EAW falls under Article 5(1)(f) ECHR, namely the lawful arrest or detention of a person against whom action is being taken with a view to extradition (paras 53–57);
    - The objective of that Directive is to lay down minimum standards to be applied in the field of information to be given to persons suspected or accused of having committed a criminal offence, but that it also seeks to preserve the specific characteristics of the procedure relating to European arrest warrants (para 58).
  - **FD EAW is compatible with the right to effective judicial protection under Articles 6 and 47 of the Charter**, even if it provides that the information communicated

to persons arrested for the purposes of the execution of an EAW is limited to the information referred to in Article 8(1) of EAW FD and in the model in Annex II to Directive 2012/13.

- The decision to issue a European arrest warrant must, in the issuing Member State, be subject to review by a court which meets in full the requirements inherent in effective judicial protection (para 69).
- The requested person acquires, from the moment of his surrender, the status of 'accused person' within the meaning of Directive 2012/13 and therefore enjoys all the rights associated with that status referred to in Articles 4, 6 and 7 of that directive (para 77).
- Article 8(1)(d) and (e) of the EAW FD provides that the EAW must contain information concerning the nature and legal classification of the offence and a description of the circumstances in which the offence was committed, including the time, place and degree of participation by the requested person (para 78).
- The right to effective judicial protection does not require that the right to challenge the decision to issue an EAW for the purposes of criminal prosecution can be exercised before surrender. Therefore, the mere fact that the requested person is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered cannot result in any infringement of the right to effective judicial protection (paras 79 and 80).

## 2. Admissibility of a request for a preliminary ruling by an issuing judicial authority

The CJEU interpreted Article 267 of the Treaty on the Functioning of the European Union (TFEU), which establishes the preliminary ruling procedure, in the context of the EAW FD and accepted that an **issuing** judicial authority can request a preliminary ruling that concerns obligations of the **executing** judicial authority (AY). The CJEU also accepted that an issuing judicial authority can request a preliminary ruling where the EAW has already been annulled, with a view to adopting a new EAW (*Spetsializirana prokuratura (Déclaration des droits)*).

### Case C-268/17, AY, Judgment of 25 July 2018.

- See also *infra* 4 (on the obligation to execute an EAW) and *infra* 7.3 (on *ne bis in idem*).
- **Facts.** AY is a Hungarian national against whom criminal proceedings were initiated in Croatia in 2011 in relation to active corruption. The competent Hungarian authority was requested to provide international legal assistance by interviewing AY as a suspect and delivering a summons to him. No action was taken on that request by Hungary, on the ground that the execution of the request would have affected Hungarian national interests. Consequently, the Croatian investigation was suspended in December 2012. On the basis of the information communicated by the Croatian authorities, the Hungarian authorities in 2011 opened their own investigation. This investigation, which was opened not against AY as a suspect but only in connection with the criminal offence against an unknown person, was terminated in 2012 on the ground that the acts committed did not constitute a criminal offence under Hungarian law. In the context of the Hungarian investigation, AY had been interviewed as a witness only. In 2013, after Croatia's accession to the EU and before criminal proceedings were initiated in Croatia, Croatia issued an EAW against AY. The execution of that EAW was refused by Hungary on the grounds that criminal proceedings had already been brought in Hungary in respect of the same acts and those proceedings had been halted. In 2015, following AY's indictment in Croatia, a new EAW was issued, which was, however, never executed by Hungary. The referring court had doubts as to the interpretation of the grounds for non-execution laid down in Articles 3(2) and 4(3) EAW FD and also considered it necessary to refer questions to the CJEU to ascertain the obligations of the executing Member State in the case where an EAW has been issued several times by various competent authorities in the course of phases prior to and subsequent to the initiation of criminal proceedings (see *infra* 7.3). AY disputed the admissibility of the request for a preliminary ruling on the ground that the answers to the questions submitted were irrelevant for the purpose of the proceedings in default brought against him in Croatia. He argued that there was no need for the CJEU to answer those questions to enable the referring court to deliver judgment on the charges.
- **Main question.** Is the request for a preliminary ruling admissible?
- **CJEU's reply.** **The CJEU dismissed AY's arguments and ruled that the reference for a preliminary ruling was admissible.** The CJEU's main arguments follow.
  - **The assessment for submitting a question lies with the national court.** In the context of Article 267 TFEU, it is solely for the national court to determine both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits (para 24, with reference to *Sleutjes* and other case-law).
  - **In exceptional cases the CJEU may refuse to rule on a question referred by a national court.** The CJEU may refuse where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object,

where the problem is hypothetical or where the CJEU does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (para 25, with reference to *Sleutjes* and other case-law).

- In the present case, the facts of the case do not seem to correspond to one of the above situations; the referring court brought the matter before the CJEU with a view to adopting a decision to withdraw the EAW issued against AY (paras 26 and 27).
- **The admissibility is not called into question by the fact that the questions submitted by the issuing judicial authority concern the obligations of the executing judicial authority.** The issue of an EAW could result in the arrest of the requested person and, therefore, affects their personal freedom. The CJEU has held that, with regard to EAW proceedings, observance of fundamental rights falls primarily within the responsibility of the issuing Member State (para 28, with reference to *Piotrowski*). Therefore, to ensure observance of those rights, which may lead a judicial authority to decide to withdraw the EAW it issued, such an authority must be able to refer questions to the CJEU for a preliminary ruling (para 29).

### Case C-649-19, *Spetsializirana prokuratura (Déclaration des droits)*, Judgment of 28 January 2021

- See also *supra* 2 (on validity of the EAW FD).
- **Facts.** See *supra* 2.
- **Main question.** Is the request for a preliminary ruling submitted by the issuing judicial authority admissible where the EAW has already been annulled?
- **CJEU's reply.** **The CJEU dismissed the arguments of the German government and ruled that the reference for a preliminary ruling was admissible.** The CJEU's main arguments follow.
  - **The assessment for submitting a question lies with the national court.** In the context of Article 267 TFEU, it is solely for the national court to determine both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits (para 35).
  - **In exceptional cases the CJEU may refuse to rule on a question referred by a national court.** The CJEU may refuse where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical or where the CJEU does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (para 36).
  - In the present case, the current nature of the dispute and the judicial nature of the proceedings are not in doubt, since the Specialised Public Prosecutor's Office has brought **criminal proceedings, which are still ongoing**, against IR and the matter was brought before the Court **with a view to adopting, depending on the answers provided to the questions referred, a new EAW** in respect of IR (paras 37 and 38).
  - With regard to EAW proceedings, **observance of fundamental rights falls primarily within the responsibility of the issuing Member State.** Therefore, to ensure observance of those rights, which may lead a judicial authority to decide to issue an EAW, such an authority must be able to refer questions to the CJEU for a preliminary ruling (para 39, with a reference to AY).

### 3. Content and validity of the EAW: requirements as to the lawfulness of the EAW

The CJEU explained to what extent the non-fulfilment of some of the requirements inherent in Articles 1(1), 6(1) and 8(1) EAW FD can affect the validity of the EAW and interpreted, in this regard, several crucial concepts of the EAW FD.

So far the CJEU has interpreted the requirements of ‘**an arrest warrant**’ (Article 8(1)(c) EAW FD), the requirement to mention the ‘**penalty imposed** if there is a final judgment’ (Article 8(1)(f) EAW FD), and the notion of ‘**judicial decision**’ (Article 1(1) EAW FD) and ‘**judicial authority**’ (Article 6(1) EAW FD).

#### 3.1. National arrest warrant

In relation to the requirement of ‘**an arrest warrant**’ (Article 8(1)(c) EAW FD), the CJEU held that if no ‘national arrest warrant’, separate from the EAW, exists, the EAW does not satisfy the requirements as to lawfulness laid down in Article 8(1) EAW FD and the executing authority must refuse to give effect to it (*Bob-Dogi*). The CJEU also clarified that a confirmation by the public prosecutor’s office, of a national arrest warrant issued previously by a police service constitutes a ‘judicial decision’, within the meaning of Article 8(1)(c) EAW FD (*Özçelik*). The notion of ‘[national] arrest warrant or any other enforceable judicial decision having the same effect’ refers to a national measure which, even if it is not referred to as a ‘national arrest warrant’, allows for the research and arrest of a person with a view to his or her appearance before a court for the purpose of conducting criminal proceedings (*MM*). It is for the national court in the issuing Member State to determine, in the light of national law, what consequences the absence of a valid national arrest warrant may have on the decision to keep the surrendered person in provisional detention (*MM*). The CJEU also clarified that the requirements of effective judicial protection, that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution, presuppose that either the EAW or the national arrest warrant on which it is based be subject to judicial review by a court in the issuing Member State prior to the surrender of the requested person (*PI*).

#### Case C-241/15, *Bob-Dogi*, Judgment of 1 June 2016.

- **Facts.** A Romanian national, Bob-Dogi, had been the subject of an EAW issued by a Hungarian judicial authority for prosecution purposes. He was arrested in Romania and placed in detention while a decision on the execution of the EAW issued against him was awaited. The EAW had been issued in Hungary on the basis of a ‘simplified procedure’. Hungarian law allows, under certain conditions, that an EAW is issued directly without the need for any prior national arrest warrant.
- **Main questions.** Does the term ‘arrest warrant’ mentioned in Article 8(1)(c) EAW FD refer to a ‘national’ arrest warrant distinct from the EAW, and, if so, does the absence of such a national warrant constitute an implicit ground for refusal to execute the EAW?
- **CJEU’s reply.** **The term ‘arrest warrant’ must be understood as referring to a national arrest warrant that is distinct from the EAW. If the executing judicial authority concludes**

**that the EAW is not valid because it was issued in the absence of any national warrant separate from the EAW, the executing judicial authority must refuse to give effect to it.** The CJEU's main arguments follow.

- **A national warrant is needed that is distinct from the EAW.** On the basis of a textual interpretation of the provision (paras 42–46), its *effet utile* (para 47) and the context and objectives pursued by the EAW FD (paras 49–57), the CJEU concludes that the term 'arrest warrant' mentioned in Article 8(1)(c) EAW FD must be understood as referring to a national arrest warrant that is distinct from the EAW (para 58).
- **The list of grounds for non-recognition and guarantees is exhaustive.** The lack of a reference in the EAW to a national arrest warrant is not one of the refusal grounds laid down in Articles 3, 4 and 4(a) EAW FD (paras 61 and 62).
- **However, Article 8(1)(c) EAW FD lays down a requirement as to lawfulness, which must be observed if the EAW is to be valid.** A failure to comply with it must in principle result in the executing judicial authority refusing to give effect to that warrant (para 64).
- **Duty to request for additional information.** If an EAW does not contain any reference to a national arrest warrant, the executing judicial authority must request all necessary supplementary information from the issuing judicial authority, as a matter of urgency, pursuant to Article 15(2) EAW FD. The executing judicial authority must then examine – on the basis of that information and any other information available to it – the reason for the lack of reference to a national arrest warrant in the EAW (para 65).
- **Consequences of the absence of a separate national warrant.** If the executing authority concludes that the EAW is not valid because it was issued in the absence of any national warrant separate from the EAW, the executing judicial authority must **refuse to give effect to it** on the basis that it does not satisfy the requirements as to lawfulness laid down in Article 8(1) EAW FD (para 66).

### Case C-453/16 PPU, *Özçelik*, Judgment of 10 November 2016.

- See also *infra* under 3.3. (on judicial authority).
- **Facts.** A Hungarian district court issued an EAW against *Özçelik*, a Turkish national, in connection with criminal proceedings instituted against him in respect of two offences committed in Hungary. In Section B of the EAW form, reference was made to an arrest warrant of a Hungarian police department, which had been confirmed by a decision of a Hungarian public prosecutor's office. The request for execution of the EAW came before a Dutch court, which had doubts whether such a national arrest warrant was covered by Article 8(1)(c) EAW FD.
- **Main question.** May a national arrest warrant issued by a police service and subsequently confirmed by a decision of a public prosecutor's office be classified as a 'judicial decision' within the meaning of Article 8(1)(c) EAW FD?
- **CJEU's reply.** **A decision of a public prosecutor's office is covered by the term 'judicial decision' of Article 8(1)(c) EAW FD.** The CJEU's main arguments follow.
  - **Wording of Article 8(1)(c) EAW FD.** This provision refers to the **national** arrest warrant, which is a judicial decision that is distinct from the EAW (para 27, with reference to *Bob-Dogi*).
  - **Issuing and validation.** The national arrest warrant was issued by the police but validated by the public prosecutor; thus, the public prosecutor is to be treated as the issuer of that arrest warrant (para 30).
  - **Need for consistency in the interpretation of various provisions of the EAW FD:**
    - in the context of Article 6(1) EAW FD, the term 'judicial authority' refers to Member State authorities that administer criminal justice, excluding police services (para 32, with reference to *Poltorak*);



- the public prosecutor's office constitutes a Member State authority responsible for administering criminal justice (para 34).
- **The objectives of the EAW FD support this interpretation (paras 35 and 36):**
  - the new surrender regime is aimed at contributing to the attainment of the objective set for the EU to become an area of freedom, security and justice, founded on the high level of confidence that should exist between the Member States;
  - the confirmation of the national arrest warrant by the public prosecutor provides the executing judicial authority with the assurance that the EAW is based on a decision that has undergone judicial approval.

### Case C-414/20 PPU, MM, Judgment of 13 January 2021

- See also *infra* under 3.3 (on judicial authority).
- **Facts.** The Bulgarian investigating body, with the consent of the public prosecutor, placed MM under investigation for having participated in a criminal drug trafficking organisation. As MM had absconded, that order was intended only to inform him of the charges against him, not to place him in detention. On 16 January 2020, the public prosecutor issued an EAW for MM, indicating the order by which MM was put under investigation as 'the decision on the basis of which the arrest warrant has been issued'. In execution of that warrant, MM was arrested in Spain and was surrendered to Bulgaria. Following his surrender, MM was placed in provisional detention. MM challenged the lawfulness of that order before the referring court, on the ground that it was based on an invalid EAW. The referring court thus asks the CJEU whether a national law providing that an EAW is issued by a public prosecutor without any involvement of a court is in conformity with Article 6(1) EAW FD, and whether an EAW must be regarded as invalid when it is not based on a national arrest order or any other measure having the same effect. In addition, it asks whether, where national law does not provide that, it can have jurisdiction to review the lawfulness of an EAW issued by a judicial authority other than a court. Lastly, it asks whether a finding that the issuing of the EAW was in breach of EU law has the effect of releasing a person in provisional detention following his surrender to the issuing Member State.
- **Main question.** Does Article 8(1) EAW FD mean that an EAW is invalid where it is not based on a national 'arrest warrant or any other enforceable judicial decision having the same effect'? Does the EAW FD, read in the light of the right to effective judicial protection under Article 47 of the Charter, require the release of the surrendered person, where the competent court of the issuing Member State holds that the EAW on which the person was surrendered and subsequently placed in provisional detention is invalid on the ground that it is not based on a 'national arrest warrant or any other enforceable judicial decision having the same effect'?
- **CJEU's replies: Article 8(1) EAW FD must be interpreted as meaning that an EAW is invalid where it is not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect'. Such notion refers to national measures adopted by a judicial authority that allow for the research and arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings. It is for the referring court to determine whether a national order placing a person under investigation has that legal effect. The EAW FD, read in the light of the right to effective judicial protection, enshrined in Article 47 of the Charter, does not require the release of the person placed in provisional detention following his surrender from the issuing Member State, where a national court finds that the EAW was issued in violation of Article 8(1)(c) of the EAW FD in that it was not based on a '[national] arrest warrant or any other enforceable judicial decision having the same effect'. It is for the referring court to decide, in conformity with its national law, what are the consequences**

**that the absence of a national arrest warrant as legal basis for the issuing of an EAW may have on the decision to keep a person who is subject to criminal prosecution in provisional detention.** The CJEU's main arguments follow.

- **The notion of 'arrest warrant or any other enforceable judicial decision having the same effect':**
  - The notion of 'arrest warrant or any other enforceable judicial decision having the same effect' refers to a national measure that is separate from the decision to issue an EAW (para 51, with reference to *Bob-Dogi*);
  - To fall within such notion, a national measure which serves as basis for an EAW must, even if it is not referred to as a 'national arrest warrant', produce equivalent legal effects, that is to say, allow for the research and arrest of that person with a view to his or her appearance before a court for the purpose of conducting the stages of the criminal proceedings. This notion therefore does not cover all measures that launch a prosecution, but only those that allow, through judicial coercion, the arrest of that person (para 53);
  - In the present case, the national order on which the EAW is based is the order placing the person under investigation, which is meant solely to notify him of the charges against him and to give him the possibility of defending himself by providing explanations or offers of evidence (paras 54 and 55).
  - It does not appear, which it is for the referring court to establish, that the European arrest warrant at issue has its legal basis in 'an arrest warrant or any other enforceable judicial decision having the same effect', and the EAW must therefore be regarded as invalid (para 56).
- **The consequences of the invalidity of the EAW on provisional detention in the issuing Member State:**
  - The aim of the EAW is to enable the arrest and surrender of a requested person so that the crime committed does not go unpunished. It follows that, where the requested person has been arrested and then surrendered to the issuing Member State, the EAW has, in principle, exhausted its legal effects and it cannot serve as legal basis for the detention of the person sought in the issuing Member State (paras 76 and 77);
  - In the absence of any harmonisation of the conditions under which a person who is the subject of a criminal prosecution can be placed and kept in provisional detention, it is only in the conditions laid down in its national law that the court having jurisdiction may decide to adopt such a measure and, where appropriate, interrupt its execution if it finds that such conditions are no longer met (para 78).
  - Therefore neither the EAW FD, nor Article 47 of the Charter require the release of the person subject to provisional detention where the national court holds that the EAW which allowed his surrender is invalid (para 80).

### Case C-648/20 PPU, *PI*, Judgment of 10 March 2021

- See also *infra* under 3.3 (on judicial authority).
- **Facts.** A Bulgarian public prosecutor issued an EAW against PI for the purpose of prosecuting him for theft. The EAW was based on a national arrest warrant issued by the same public prosecutor, ordering the detention of PI for a maximum of 72 hours. PI was arrested in the United Kingdom on the basis of the EAW. The referring court, called to decide on the execution of the EAW, harbours doubts as to whether the fact that both the EAW and the national arrest warrant were issued by a public prosecutor, without the involvement of a court prior to the

surrender, is compatible with the dual level of protection required by the EAW FD in *Bob Dogi* and the requirements inherent in effective judicial protection.

- **Main question.** Are the requirements inherent in the effective judicial protection that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution satisfied where both the EAW and national arrest warrant are issued by a public prosecutor – who may be classified as an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD – but cannot be reviewed by a court in the issuing Member State prior to the surrender of the requested person?
- **CJEU’s reply.** **Article 8(1)(c) EAW FD, read in the light of Article 47 of the Charter and the case-law of the CJEU, must be interpreted as meaning that the requirements inherent in the effective judicial protection that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution are not satisfied where both the EAW and the judicial decision on which that warrant is based are issued by a public prosecutor – who may be classified as an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD – but cannot be reviewed by a court in the issuing Member State prior to the surrender of the requested person by the executing Member State.** The CJEU’s main arguments follow.
  - **The effectiveness and proper functioning of the simplified system for the surrender, established by EAW FD, are based on compliance with certain requirements laid down by that framework decision, the scope of which has been established by the case-law of the Court:**
    - the Bulgarian prosecutor can be classified as an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD, but this is not sufficient to conclude that the Bulgarian procedure relating to the issuing of an EAW by a prosecutor satisfies the requirements inherent in effective judicial protection (para 38):
      - the public prosecutor in Bulgaria is an authority that participates in the administration of criminal justice and is independent in the execution of those of its responsibilities which are inherent in the issuing of an EAW (para 37);
      - judicial review of the decision taken by an authority other than a court to issue an EAW is not a condition for classification of that authority as an issuing judicial authority within the meaning of Article 6(1) EAW FD but concerns the procedure for issuing such a warrant, which must satisfy the requirement of effective judicial protection (para 38, with reference to *MM*);
    - the prosecutor’s decision ordering the detention of the requested person for a maximum of 72 hours, on which the EAW is based, must be classified as an ‘enforceable judicial decision having the same effect’ as a national arrest warrant, within the meaning of Article 8(1)(c) EAW FD (para 39, with reference to *MM*).
  - **Effective judicial protection presupposes that judicial review of either the EAW or the judicial decision on which it is based is possible before that warrant is executed** (para 48):
    - it follows from the CJEU’s case-law that a person who is the subject of an EAW for the purpose of criminal prosecution must be afforded effective judicial protection before being surrendered to the issuing Member State, at least at one of the two levels of protection required by that case-law (paras 42-47, with reference to *Bob Dogi, OG and PI*);
    - that requirement makes it possible for the executing judicial authority to be satisfied that the EAW has been issued following a national procedure that is subject to judicial review in the context of which the requested person has had

- the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights referred to in Article 1(3) of EAW FD (para 49);
- These considerations are in no way called into question by the case-law in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)* and *Openbaar Ministerie (Swedish Public Prosecutor's Office)*:
    - In this case-law, the CJEU held that procedural rules according to which the proportionality of the decision of the Public Prosecutor's Office to issue an EAW may be subject, before or after the actual surrender of the requested person, to judicial review before or almost at the same time as the EAW is issued and, in any event, after it has been issued, meet the requirement of effective judicial protection (paras 50-52):
    - In the national legislation at issue in those cases, the EAW was based on a national arrest warrant issued by a judge, who, moreover, made an assessment of the conditions to be met when issuing an EAW and, in particular, whether it was proportionate (para 53);
  - It cannot be inferred from *MM* that the CJEU ruled that the existence of a possibility of *ex post* judicial review was such as to satisfy the requirements inherent in the effective judicial protection of the rights of the requested person:
    - the CJEU did not rule directly on the question whether the Bulgarian procedure for the issuing of an EAW by a prosecutor during the pre-trial stage of criminal proceedings satisfied the requirements inherent in effective judicial protection, but confined itself to holding that, where the law of the issuing Member State does not contain a separate legal remedy, EU law confers jurisdiction on a court of that Member State to review indirectly the validity of the EAW (para 56);
  - **A judicial review of a prosecutor's decision to issue an EAW which takes place only after the requested person is surrendered does not satisfy the obligation of the issuing Member State to implement procedural rules allowing a court to review, prior to that surrender, the lawfulness of the national arrest warrant, also adopted by a prosecutor, or of the EAW (para 57):**
    - The Member States retain their procedural autonomy in implementing the EAW FD. However, they must ensure that their national rules do not frustrate the requirements arising from that framework decision, in particular as regards the judicial protection, guaranteed by Article 47 of the Charter (para 58).
    - The objective of the EAW FD to facilitate and accelerate judicial cooperation can only be achieved through respect for fundamental rights and legal principles, as enshrined in Article 6 TEU and reflected in the Charter (para 59).

### 3.2. Penalty imposed

In relation to the requirement to mention the '**penalty imposed** if there is a final judgment' (Article 8(1)(f) EAW FD), the CJEU clarified that a failure to indicate in an EAW an **additional** sentence of conditional release does not necessarily preclude the enforcement of that additional sentence (*IK*).

### Case C-551/18 PPU, *IK*, Judgment of 6 December 2018.

- **Facts.** A Belgian court sentenced IK to a primary custodial sentence of 3 years for the sexual assault of a minor under 16 years of age without violence or threat (the primary sentence). In the same judgment, and for the same offence, IK was also subject to an additional sentence of release conditional to placement at the disposal of the court for a 10-year period (the additional sentence). In accordance with Belgian law, the additional sentence takes effect after the expiry of the main sentence if the court for the enforcement of custodial sentences decides accordingly. When the Belgian issuing judicial authority issued an EAW against IK for the enforcement of the sentence, the EAW mentioned only the main sentence, not the additional sentence. The Dutch Court executed the EAW and ordered IK's surrender. In Belgium, IK was first deprived of liberty based on the main sentence. When the court for the enforcement of custodial sentences sentenced IK to conditional release at its disposal, IK claimed that the court could not order deprivation of liberty pursuant to that sentence because the EAW issued by the Belgian authorities had not mentioned it. After the court dismissed IK's argument, IK brought an appeal on a point of law before the Belgian Court of Cassation, which then referred the question for a preliminary ruling.
- **Main question.** Does the failure to indicate in an EAW an additional sentence of conditional release preclude the enforcement of that additional sentence?
- **CJEU's reply.** **Article 8(1)(f) EAW FD must be interpreted as meaning that failure to indicate, in the EAW pursuant to which the person concerned has been surrendered, an additional sentence of conditional release which was imposed on that person for the same offence in the same judicial decision as that relating to the main custodial sentence does not, on the facts of the case in the main proceedings, preclude the enforcement of that additional sentence, on the expiry of the main sentence after an express decision to that effect is taken by the national court with jurisdiction for the enforcement of sentences, from resulting in deprivation of liberty.** The CJEU's main arguments follow.
  - **Failure to indicate the additional sentence in the EAW did not affect the exercise of the jurisdiction that the executing judicial authority derives from Articles 3 to 5 EAW FD:**
    - the EAW FD is based on the principles of mutual recognition and mutual trust (paras 34–40);
    - executing judicial authorities may refuse to execute an EAW only on the grounds for non-execution exhaustively listed (Articles 3 and 4 EAW FD) and the execution of the warrant may be made subject only to one of the conditions exhaustively laid down (Article 5 EAW FD (paras 41 and 42));
    - in the present case, the executing judicial authority was not prevented from applying the rules provided in Articles 3 to 5 EAW FD (para 46).
  - **The EAW satisfied the requirement as to lawfulness referred to in Article 8(1)(f) EAW FD:**
    - the requirement to indicate 'the penalty imposed' if there is a final judgment is intended to enable the executing judicial authority to satisfy itself that the EAW falls within the scope of the EAW FD and in particular that it exceeds the threshold set out in Article 2(1) EAW FD (paras 48–51);
    - in the present case, the main sentence of 3 years' imprisonment to which IK was sentenced exceeds that threshold (para 52).
  - **The counter-arguments that had been raised should be dismissed:**
    - the basis for the enforcement of the custodial sentences is not the decision of the executing authority but the enforceable judgment pronounced in the issuing Member State (paras 55 and 56);

- the fact that the executing judicial authority was not informed of the additional sentence does not fall within the scope of the rule of speciality (para 61);
- Article 15(3) EAW FD does not require the issuing judicial authority to inform the executing judicial authority, after that authority has acceded to the request for surrender, of the existence of an additional sentence so that the executing judicial authority may adopt a decision regarding the possibility of enforcing that sentence in the issuing Member State (paras 62–68):
  - observance of the rights of the requested person falls primarily within the responsibility of the issuing Member State (para 66);
  - the executing judicial authority's decision is without prejudice to the requested person's opportunity, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable the person to challenge the lawfulness of their detention in a prison of that Member State (para 67).

### 3.3. Judicial authority and judicial decision

**Judicial decision.** In relation to the meaning of 'judicial decision', the CJEU specified that EAWs issued by the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania were not 'judicial decisions' in the meaning of Article 1(1) EAW FD (*Poltorak; Kovalkovas*). However, EAWs issued by a public prosecutor can fall within that concept, despite the fact that those public prosecutors are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, provided that those arrest warrants are subject to endorsement by a court that reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form (*NJ*).

**Issuing judicial authority.** In relation to the meaning of 'judicial authority', the CJEU underlined that this term constitutes an autonomous concept of EU law and it is capable of including authorities that, although not necessarily judges or courts, participate in the administration of justice. The CJEU held that the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania do not constitute 'issuing judicial authorities' in the meaning of Article 6(1) EAW FD (*Poltorak; Kovalkovas*). The concept also does not include public prosecutors who 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 an EAW (*OG and PI*). However, the term 'issuing judicial authority' includes public prosecutors who, while institutionally independent from the judiciary, are responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords them a guarantee of independence from the executive in connection with the issuing of an EAW (*PF; JR and YC*).

**Effective judicial protection.** If, in the issuing Member State, the competence to issue an EAW does not lie with a court but with another authority participating in the administration of justice, the decision to issue the EAW and the proportionality of such a decision must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements



inherent in effective judicial protection. It is for the Member States to ensure that their legal orders effectively safeguard the required level of judicial protection by means of the procedural rules that they implement. These rules may vary from one Member State to another. Introducing a separate right of appeal against a public prosecutor's decision to issue an EAW is one possibility, but Member States can also opt for other mechanisms (*JR and YC; XD*). For instance, national procedural rules whereby the court that adopted the national arrest warrant reviews the decision of the public prosecutor's office to issue an EAW before or practically at the same time as that decision is adopted, or subsequently, including after the requested person's surrender, would meet the required threshold (*JR and YC; XD*). Where national law does not provide for a separate remedy, neither before, concomitantly or subsequently to the issuing of the EAW by a public prosecutor, a court, which is called upon to decide on the lawfulness of the provisional detention of a person surrendered in execution of an EAW, must declare its jurisdiction to indirectly review its validity in light of EU law (*MM*). Where both the EAW and the national arrest warrant on which it is based are issued by a public prosecutor, the requirements of effective judicial protection that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution presuppose that either the EAW or the national arrest warrant on which it is based be subject to judicial review by a court in the issuing Member State prior to the surrender of the requested person (*PI*).

**Executing judicial authority.** The CJEU interpreted the concept of 'executing judicial authority' within the meaning of Articles 6(2), 27(3)(g) and 27(4) EAW FD. The CJEU considered that its abovementioned case-law on the concept of 'issuing judicial authority' (participation in the administration of criminal justice, objectivity and independence) and requirements concerning 'effective judicial protection' could be transposed to the execution phase of EAWs (*Openbaar Ministerie (Faux en écritures)*).

**Systematic/generalised deficiencies affecting the independence of the issuing Member State's judiciary.** Such deficiencies, however serious, are not sufficient on their own to enable an executing judicial authority to consider that all the courts of that Member State fail to fall within the concept of an 'issuing judicial authority' (*Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*).

### Case C-452/16 PPU, *Poltorak*, Judgment of 10 November 2016.

- **Facts.** A Swedish district court imposed a custodial sentence of 1 year and 3 months on Poltorak, a Polish national, for acts involving infliction of grievous bodily injury. Subsequently, the Swedish police board issued an EAW against Poltorak with a view to executing that sentence in Sweden. The request for execution of the EAW came before the Dutch district court, which had doubts whether a police service is competent to issue an EAW.
- **Main questions.** Is the term 'judicial authority', referred to in Article 6(1) EAW FD, an autonomous concept of EU law? Is a police service, such as that at issue in the main proceedings, covered by the term 'issuing judicial authority' within the meaning of Article 6(1) EAW FD? Can the EAW that was issued by that police service with a view to executing a judgment imposing a custodial sentence be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD?
- **CJEU's reply.** The term 'judicial authority' is an autonomous concept of EU law. A police service, such as that at issue in the main proceedings, is not covered by the term 'issuing

**judicial authority' and an EAW that was issued by that police service cannot be regarded as a 'judicial decision'.** The CJEU's main arguments follow.

- **Autonomous concept of EU law.** The term 'judicial authority' contained in Article 6(1) EAW FD is an autonomous concept of EU law (paras 30–32).
- **Meaning of 'judicial authority'.**
  - The term 'judicial authority' is not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the Member State authorities that administer criminal justice (paras 33 and 38).
  - Police services are not covered by the term 'judicial authority' (para 34) for the following reasons.
    - The principle of separation of powers. It is generally accepted that the term 'judiciary' does not cover administrative authorities or police services, which fall within the province of the executive (para 35).
    - The context of the EAW FD (paras 38–42):
      - the entire surrender procedure between Member States is to be carried out under judicial supervision (with reference to *Jeremy F*);
      - Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW because the role of central authorities is limited to practical and administrative assistance for the competent judicial authorities.
    - The objectives of the EAW FD (paras 24–27 and 43–45):
      - the principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review;
      - the issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
    - The fact that a police service is only competent in the strict context of executing a judgment that was handed down by a court and has become legally binding does not call into question this interpretation (paras 47–51):
      - the decision to issue the EAW is ultimately a matter for that police service and not for a judicial authority;
      - that police service issues the EAW not at the request of the judge who adopted the judgment imposing the custodial sentence but at the request of the prison services;
      - that police service has a discretion over the issue of the EAW and that discretion is not subject to judicial approval *ex officio*.
- **Meaning of 'judicial decision'.** An EAW issued by that police service with a view to executing a judgment imposing a custodial sentence cannot be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD (para 52).

### Case C-477/16 PPU, *Kovalkovas*, Judgment of 10 November 2016.

- **Facts.** A Lithuanian court imposed a custodial sentence of 4 years and 6 months on Kovalkovas, a Lithuanian national, for acts involving infliction of grievous bodily injury. Subsequently, the Lithuanian Ministry of Justice issued an EAW against Kovalkovas with a view to executing in Lithuania the remainder of that sentence to be served. The request for execution of the EAW



came before the Dutch district court, which had doubts whether the Lithuanian Ministry of Justice was competent to issue an EAW.

- **Main questions.** Is the term ‘judicial authority’, referred to in Article 6(1) EAW FD, an autonomous concept of EU law? Is a ministry of justice covered by the term ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD? Can an EAW that was issued by that Ministry of Justice with a view to executing the remainder of a custodial sentence be regarded as a ‘judicial decision’ within the meaning of Article 1(1) EAW FD?
- **CJEU’s reply. The term ‘judicial authority’ is an autonomous concept of EU law. A ministry of justice is not covered by the term ‘issuing judicial authority’, and the EAW that was issued by it cannot be regarded as a ‘judicial decision’.** The CJEU’s main arguments follow.
  - **Autonomous concept of EU law.** The term ‘judicial authority’ in Article 6(1) EAW FD is an autonomous concept of EU law (paras 31–33).
  - **Meaning of ‘judicial authority’.**
    - Article 6(1) EAW FD must be interpreted to mean that the term ‘judicial authority’ is not limited to the judges or courts of a Member State but may extend, more broadly, to the Member State authorities that administer criminal justice (para 34, with reference to *Poltorak*).
    - An organ of the executive of a Member State, such as a ministry, is not covered by the term ‘judicial authority’ (para 35) for the following reasons.
      - The principle of separation of powers. It is generally accepted that the term ‘judiciary’ does not cover ministries of Member States, which fall within the province of the executive (para 36).
      - The context of the EAW FD (paras 37–39):
        - The entire surrender procedure between Member States is to be carried out under judicial supervision (with reference to *Jeremy F*).
        - The role of central authorities is limited to practical and administrative assistance for the competent judicial authorities. Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW.
      - The objectives of the EAW FD (paras 25–28 and 40–45):
        - the principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review;
        - the issue of an arrest warrant by a non-judicial authority, such as the Lithuanian Ministry of Justice, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
      - The fact that the Ministry of Justice acts only in the strict context of executing a judgment that has become legally binding – both handed down by a court following court proceedings and at the request of a court – does not call into question this interpretation (paras 46–48):
        - the Lithuanian Ministry of Justice, and not the judge who imposed the custodial sentence decision, takes the ultimate decision to issue the EAW;
        - the Lithuanian Ministry of Justice supervises observance of the necessary conditions for that issue and also enjoys discretion as regards its proportionality.

- **Meaning of ‘judicial decision’.** An EAW issued by the Ministry of Justice with a view to executing a judgment imposing a custodial sentence cannot be regarded as a ‘judicial decision’ within the meaning of Article 1(1) EAW FD (para 48).

### Case C-453/16 PPU, *Özçelik*, Judgment of 10 November 2016.

- See *supra* under 3.1 (on national arrest warrant).

### Joined Cases C-508/18, *OG*, and C-82/19 PPU, *PI*, Judgment of 27 May 2019.

- **Facts.** OG is a Lithuanian national who was residing in Ireland. In 2016, a German public prosecutor’s office sought his surrender pursuant to an EAW for the prosecution of a criminal offence which that public prosecutor’s office identified as ‘murder, grievous bodily injury’. In 2018, PI, a Romanian national, was the subject of an EAW issued by another German public prosecutor’s office for the prosecution of a criminal offence identified as ‘organised or armed robbery’. Both OG and PI challenged the validity of the respective EAWs on the ground that the public prosecutor’s offices were not a ‘judicial authority’ within the meaning of Article 6(1) EAW FD. The referring Irish courts were uncertain whether the German public prosecutor’s offices met the criteria of a ‘judicial authority’ within the meaning of Article 6(1) EAW FD and therefore referred the cases to the CJEU.
- **Main question.** Does the concept of ‘issuing judicial authority’ include the public prosecutors’ offices of a Member State, which are subordinate to a body of the executive 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 an EAW?
- **CJEU’s reply.** **The concept of an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD does not include public prosecutors’ offices of a Member State, which 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 an EAW.** The CJEU’s main arguments follow.
  - The term ‘issuing judicial authority’ requires an **autonomous and uniform interpretation** (para 49, with reference to *Poltorak, Kovalkovas*).
  - **An authority that participates in the administration of criminal justice:**
    - the words ‘judicial authority’ are not limited to designating only the judges or courts of a Member State but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from ministries or police services, which are part of the executive (paras 50 and 51, with reference to *Poltorak, Kovalkovas*);
    - the German public prosecutor’s office must be regarded as participating in the administration of criminal justice (paras 61–63).
  - **Effective judicial protection.**
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 67, with reference to *Bob-Dogi*).
    - As regards a measure, such as the issuing of an EAW, that is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter, that protection means that a decision meeting the requirements

- inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 68).
- The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 71, with reference to *Kovalkovas*).
  - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 75).
- **An authority that is objective and independent.**
- The ‘issuing judicial authority’ must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive (para 73, with reference to *Kovalkovas*).
  - In the present case, it is clear that German public prosecutors’ offices are required to act objectively and must investigate not only incriminating but also exculpatory evidence. Nevertheless, the fact remains that, in accordance with the German Law on the Judicial System (paras 146 and 147), the Minister for Justice has an ‘external’ power to issue instructions in respect of those public prosecutors’ offices (para 76).
  - That finding cannot be called into question by the fact that the executive has decided not to exercise the power to issue instructions in certain specific cases (para 83) or by the fact that there is legal remedy available for individuals to challenge the public prosecutor’s decision to issue an EAW (paras 85–87).
  - An instruction in a specific case from the Minister for Justice to the public prosecutors’ offices concerning the issuing of an EAW remains permitted by the German legislation (para 87).
  - As far as the German public prosecutors’ offices are exposed to the risk of being influenced by the executive in their decision to issue an EAW, they do not appear to meet the requirement that they act independently in issuing such an arrest warrant. Therefore, they cannot be regarded as an ‘issuing judicial authority’ within the meaning of Article 6(1) EAW FD (para 88).

### Case C-509/18, PF, Judgment of 27 May 2019.

- **Facts.** In 2014, the Prosecutor General of Lithuania issued an EAW for the surrender of PF, a Lithuanian national, for the prosecution of an armed robbery. PF brought an action before the competent Irish court, challenging the validity of that EAW on the ground that the Prosecutor General of Lithuania was not a ‘judicial authority’ within the meaning of Article 6(1) EAW FD. The referring Irish supreme court was uncertain whether the Prosecutor General of Lithuania met the criteria of a ‘judicial authority’ within the meaning of Article 6(1) EAW FD and therefore referred the case to the CJEU.
- **Main question.** Does the concept of ‘issuing judicial authority’ include the prosecutor general of a Member State, who, although institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and is independent from the executive?

- **CJEU's reply.** The concept of 'issuing judicial authority' within the meaning of Article 6(1) EAW FD includes the prosecutor general of a Member State, who, although institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of an EAW. The CJEU's main arguments follow.
- The term 'issuing judicial authority' requires an **autonomous and uniform interpretation** (para 28, with reference to *Poltorak, Kovalkovas*).
  - **An authority that participates in the administration of criminal justice:**
    - the words 'judicial authority' are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from ministries or police services, which are part of the executive (paras 29 and 30, with reference to *Poltorak, Kovalkovas*);
    - the Prosecutor General of Lithuania must be regarded as participating in the administration of criminal justice (paras 40–42).
  - **Effective judicial protection.**
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 45, with reference to *Bob-Dogi*).
    - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 49, with reference to *Kovalkovas*).
    - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 53).
  - **An authority that is objective and independent.**
    - The 'issuing judicial authority' must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive (para 51, with reference to *Kovalkovas*).
    - In addition, where the law of the issuing Member State confers the competence to issue an EAW on an authority that is not a court, the decision to issue such an arrest warrant and the proportionality of such a decision must be capable of being the subject of court proceedings that meet in full the requirements inherent in effective judicial protection (para 53).
    - In the present case, the Prosecutor General of Lithuania may be considered an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD. In addition, to participate in the administration of criminal justice the prosecutor general's legal position in that Member State safeguards not only the objectivity of the prosecutor general's role but also affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of

an EAW. Nevertheless, it cannot be ascertained from the information in the case file before the Court whether a decision of the Prosecutor General of Lithuania to issue an EAW may be the subject of court proceedings that meet in full the requirements inherent in effective judicial protection, which is for the referring court to determine (paras 54–56).

### Case C-489/19 PPU, NJ, Judgment of 9 October 2019.

- **Facts.** In 2019, an Austrian public prosecutor's office issued an EAW for the surrender of NJ for the prosecution of four acts of theft. The referring German court observed that the Austrian public prosecutor's offices are subject to directions or instructions in a specific case from the executive, in this case the Federal Minister for Justice. Accordingly, it was doubtful as to the compatibility of the procedure for issuing an EAW in Austria with the requirements arising from the judgment of 27 May 2019 (*OG and PI*; C-508/18 and C-82/19 PPU). In particular, the German court entertains doubts as to the status of the public prosecutor's office in Vienna as a 'judicial authority'.
- **Main question.** Does the fact that a public prosecutor's office is required to act on instruction preclude it from effectively issuing an EAW even in the case where that decision is subject to a comprehensive judicial review prior to the execution of the EAW?
- **CJEU's reply.** **The concept of a 'European arrest warrant' referred to in Article 1(1) EAW FD must be interpreted as meaning that EAWs issued by the public prosecutor's offices of a Member State fall within that concept, despite the fact that those public prosecutor's offices 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 the context of the issue of those arrest warrants, provided that those arrest warrants are subject, in order to be transmitted by those public prosecutor's offices, to endorsement by a court which reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form.** The CJEU's main arguments follow.
  - The concept of 'judicial decision' is not limited to designating decisions only of the judges or courts of a Member State but must be construed as designating, more broadly, the decisions adopted by the authorities participating in the administration of criminal justice in that Member State, such as the Austrian public prosecutor's office, as distinct from ministries or police services, which are part of the executive (para 30, with reference to *OG and PI*).
  - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 34, with reference to *OG and PI*).
  - The executing judicial authority may be satisfied that the decision to issue an EAW for the purpose of prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) EAW FD (para 36, with reference to *OG and PI*).
  - The review must include an examination of the observance of the conditions necessary for the issuing of that arrest warrant and of whether it is proportionate to issue that warrant (para 37, with reference to *OG and PI*).

- The review must be exercised objectively, taking into account all incriminatory and exculpatory evidence, and independently (para 38, with reference to *OG and PI*).
- Under Austrian law, in the context of both the decision to issue a national arrest warrant and the decision to issue an EAW, the Austrian public prosecutor's offices order an arrest by means of an arrest warrant that a court must endorse. The court is to carry out a review of the conditions of the issue and its proportionality. The endorsement decision is subject to appeal before the courts (para 39).
- The courts responsible for the endorsement of EAWs meet the requirement of objectivity and independence. However, the Austrian public prosecutor's offices cannot be regarded as satisfying that requirement (para 40).
- Nevertheless, decisions relating to the issue of an EAW, adopted in accordance with the Austrian system, can be regarded as satisfying the minimum requirements on which their validity depends as regards the objectivity and independence of the review carried out when those decisions are adopted (para 41).
  - The decision to issue a national arrest warrant and the decision to issue an EAW must be endorsed by a court before their transmission. In the absence of endorsement of the decisions of the public prosecutor's office, arrest warrants do not produce legal effects and cannot be transmitted (para 43).
  - In the context of the endorsement procedure, the court examines the conditions necessary for the issue of the arrest warrant concerned and its proportionality, taking into account the particular circumstances of each specific case (para 44).
  - The court responsible for endorsing arrest warrants is not bound by the results of the investigation conducted by the public prosecutor's offices and must not be limited to the indications and grounds for the injunction set out by them and may, at any time, order additional investigations or carry them out itself (para 45).
- The endorsement systematically takes place *ex officio* before the arrest warrant produces legal effects and can be transmitted, and, therefore, such a review is distinct from a right to a remedy (para 46, with reference to *OG and PI*).
- The court responsible for the endorsement of an EAW exercises its review independently and in full knowledge of any instructions that may have been issued in advance and adopts, at the end of that review, a decision that is independent of the decision of the public prosecutor's office, going beyond a mere confirmation of the legality of that decision (para 47).
- In those circumstances, the decision concerning the EAW in the form in which it will be transmitted must be deemed to satisfy the requirements of objectivity and independence of the review carried out at the time of the adoption of that decision (para 48).

### Joined Cases C-566/19 PPU, JR, and C-626/19 PPU, YC, Judgment of 12 December 2019<sup>1</sup>.

- **Facts.** In 2019, a French public prosecutor's office sought the surrender of JR to prosecute him for acts committed in the context of a criminal organisation. JR was arrested in Luxembourg. In another case, a French public prosecutor's office sought the surrender of YC to prosecute him for his involvement in an armed robbery. YC was arrested in the Netherlands. The

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<sup>1</sup> See also [Case C-813/19 PPU, MN, Order of 21 January 2020](#). Request for a preliminary ruling from the Cour d'Appel d'Aix-en-Provence (France). The questions referred relate to the interpretation of Article 6(1) EAW FD (meaning of the concept 'judicial authority' in the context of EAWs issued by the French Public Prosecutor's Office). In its Order, the CJEU largely refers to its Judgment in Joined Cases C-566/19 PPU, JR and C-626/19 PPU, YC.

Luxembourgish and Dutch courts had doubts whether the French public prosecutor's office met the criteria of a 'judicial authority' within the meaning of Article 6(1) EAW FD as interpreted in the CJEU's case-law and therefore referred the cases to the CJEU.

- **Main questions.** Does the concept of 'issuing judicial authority' include the public prosecutors of a Member State who are responsible for the conduct of criminal prosecutions and who act under the direction and control of their hierarchical superiors? Are the requirements of effective judicial protection met if in the issuing Member State there is a judicial review before the EAW is issued and/or judicial review is foreseen after the actual surrender of the requested person?
- **CJEU's reply.** Article 6(1) EAW FD must be interpreted as meaning that the public prosecutors of a Member State, who are responsible for conducting prosecutions and act under the direction and supervision of their hierarchical superiors are covered by the term 'issuing judicial authority' if their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of an EAW. The EAW FD must be interpreted as meaning that the requirements inherent in effective judicial protection, which must be afforded to any person in respect of whom an EAW is issued in connection with criminal proceedings, are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State. The CJEU's main arguments follow.
  - **The concept of 'issuing judicial authority'.**
    - This concept is capable of including authorities of a Member State that, although not necessarily judges or courts, participate in the administration of criminal justice and act independently. The latter condition presupposes the existence of statutory rules and an institutional framework capable of guaranteeing that the authorities concerned are not exposed, when issuing an EAW, to any risk of being subject to directions or instructions in a specific case from the executive (para 52, with reference to *OG and PI*).
    - The French public prosecutors participate in the administration of criminal justice (para 53).
    - The French public prosecutors act objectively and independently (paras 54 and 55). This independence is not called into question by the fact that they are responsible for conducting criminal prosecutions (para 57, with reference to *PF*), or by the fact that the Minister for Justice may issue them with general criminal justice policy instructions (para 54), or by the fact that they are under the direction and control of their hierarchical superiors, themselves part of the public prosecutor's office and thus obliged to comply with the instructions of those hierarchical superiors (para 56, with reference to *OG and PI* and *PF*).
  - **Requirement of effective judicial protection.**
    - The requirement of effective judicial protection is not a condition for classification of the authority as an issuing judicial authority (para 48).
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 59, with reference to *OG and PI*).
    - As regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 60, with reference to *OG and PI*).
    - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and

whether the issuing of the EAW was proportionate (para 61, with reference to *OG and PI*).

- Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 62, with reference to *OG and PI*).
- It is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement. These procedural rules may vary from one system to another. Introducing a separate right of appeal against the decision to issue an EAW is just one possibility (paras 64–66).
- In the present case, the French system satisfies those requirements, as French procedural rules allow for the proportionality of the decision of the public prosecutor's office to issue an EAW to be judicially reviewed before, or practically at the same time as, that decision is adopted, and also subsequently (paras 67–71).

### Case C-625/19 PPU, *XD*, Judgment of 12 December 2019.

- **Facts.** In 2019, the Swedish public prosecutor issued an EAW against *XD* for the purpose of prosecuting him for participating in a criminal organisation committing drug-related offences. *XD* was arrested in the Netherlands. The Dutch court noted that, although Swedish law does not grant a right to appeal against the public prosecutor's decision to issue an EAW, its proportionality is assessed beforehand by the court adopting the national arrest warrant, as occurred in the present case. The Dutch court thus wondered whether under such circumstances the requirements of effective judicial protection as interpreted by the CJEU's case-law are nevertheless satisfied and therefore referred the case to the CJEU.
- **Main question.** Are the requirements of effective judicial protection met where the decision to issue an EAW for the purposes of conducting a criminal prosecution is adopted by an authority that, although participating in the administration of justice, is not a court and, prior to the decision of that authority to issue the EAW, a judge has reviewed the conditions for the issuing of that warrant and, in particular, its proportionality?
- **CJEU's reply.** **The EAW FD must be interpreted as meaning that the requirements inherent in effective judicial protection from which a person in respect of whom an EAW is issued for the purpose of criminal proceedings must benefit are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State.** The CJEU's main arguments follow.
  - **Requirements of effective judicial protection.**
    - The requirements of effective judicial protection are not a condition for classification of the authority as an issuing judicial authority (para 30, with reference to *JR and YC*).
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 38, with reference to *OG and PI*).
    - As regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection



should be adopted at at least one of the two levels of that protection (para 39, with reference to *OG and PI*).

- The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 40, with reference to *OG and PI*).
- Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 41, with reference to *OG and PI*).
- It is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement. They may vary from one system to another. Introducing a separate right of appeal against the decision to issue an EAW is just one possibility (paras 43 and 44).
- In the present case, the Swedish system satisfies those requirements, as, even in the absence of a separate right of appeal against the public prosecutor's decision to issue an EAW, the conditions for its issue, and in particular its proportionality, can be subject to judicial review in the issuing Member State before or practically at the same time as the decision is adopted, and also subsequently. In particular, such assessment is made in advance by the court adopting the national arrest warrant that may subsequently form the basis of the EAW, and by the court called to decide on the eventual appeal lodged by the requested person against the national decision ordering the person's preventative detention (paras 46–53).

### Case C-627/19 PPU, *ZB*, Judgment of 12 December 2019.

- **Facts.** In 2019, a Belgian public prosecutor issued an EAW against ZB with a view to executing a custodial sentence of 30 months and 1 year. ZB was arrested in the Netherlands. The Dutch court, noting that Belgian law does not provide for a separate right to appeal against the public prosecutor's decision to issue an EAW, wondered whether the requirements of effective judicial protection as interpreted by the CJEU's case-law apply also with regard to an EAW issued for the purposes of executing a custodial sentence and therefore referred the case to the CJEU.
- **Main question.** Do the requirements of effective judicial protection mean that, where a Member State confers the competence to issue an EAW for the purposes of executing a custodial sentence to an authority that, although participating to the administration of justice, is not a court, a separate right to appeal against the decision of that authority to issue an EAW must be provided?
- **CJEU's reply.** **The EAW FD must be interpreted as meaning that it does not preclude legislation of a Member State which, although it confers the competence to issue an EAW for the purposes of executing a sentence on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, does not provide for the existence of a separate judicial remedy against the decision of that authority to issue such an EAW.** The CJEU's main arguments follow.
  - **Requirements of effective judicial protection:**

- the EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 29, with reference to *OG and PI*);
  - as regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 30, with reference to *OG and PI*);
  - the second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 31, with reference to *OG and PI*);
  - where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 32, with reference to *OG and PI*).
- **Where the EAW is issued with a view to executing a custodial sentence, the judicial review of its proportionality, which is necessary to meet the requirements of effective judicial protection, is carried out by the enforceable judgment on which that arrest warrant is based** (para 35):
- an EAW issued with a view of executing a custodial sentence originates from an enforceable judgment that has rebutted the presumption of innocence to which the requested person is entitled following judicial proceedings that must comply with the requirements of Article 47 Charter (para 34);
  - the executing judicial authority can presume that the decision to issue an EAW for the purposes of executing a custodial sentence resulted from judicial proceedings in which the requested person enjoyed all the necessary safeguards for the adoption of that decision, in particular with regard to fundamental rights (para 36);
  - the proportionality of an EAW issued for the purposes of executing a custodial sentence also follows from the sentence imposed, because Article 2(1) EAW FD provides that that sentence must be a custodial sentence or a detention order made for a period of at least 4 months (para 38).

### Case C-510/19, *Openbaar Ministerie (Faux en écritures)*, Judgment of 24 November 2020.

- **Facts.** In September 2017, a Belgian investigative judge issued an EAW against AZ, a Belgian national, who was accused of fraud-related offences. In December 2017, AZ was arrested in the Netherlands and surrendered to Belgium. In January 2018, the investigating judge issued an additional EAW for other offences, requesting the competent Netherlands authorities to disapply the rule of speciality. In February 2018, the Dutch Public Prosecutor's Office gave his consent to extend the scope of the prosecution in accordance with the additional EAW. Subsequently, Belgian authorities prosecuted AZ in respect of the acts referred to in the initial EAW and the additional EAW and sentenced him to a 3-year prison term. AZ brought an appeal against his criminal conviction to the Belgian Court of Appeal, raising the issue of whether the Dutch Public Prosecutor may be considered to be an 'executing judicial authority' within the meaning of the EAW FD and consequently to have the power to give the consent provided for by that Framework Decision. On this issue, the Court of Appeal referred the case to the CJEU.

- **Main questions.** Does the concept of ‘executing judicial authority’ within the meaning of Article 6(2) EAW FD constitute an autonomous concept of EU law and, if so, what criteria must be applied for the purposes of determining the meaning of that concept? Must Article 6(2) and Article 27(3)(g) and 27(4) EAW FD be interpreted as meaning that the public prosecutor of a Member State constitutes an ‘executing judicial authority’ within the meaning of those provisions?

**CJEU’s reply.** The concept of ‘executing judicial authority’ within the meaning of Article 6(2) EAW FD constitutes an autonomous concept of EU law. It covers the authorities of a Member State which, without necessarily being judges or courts, participate in the administration of criminal justice in that Member State, acting independently in the exercise of the responsibilities inherent in the execution of an EAW and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection. Articles 6(2), 27(3)(g) and 27(4) EAW FD must be interpreted as follows. The public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an ‘executing judicial authority’ within the meaning of those provisions. The CJEU’s main arguments follow.

- The concept of ‘executing judicial authority’ referred to in Article 6(2) EAW FD constitutes an **autonomous concept of EU law** (paras 38–41, with reference to *OG and PI*).
- **The status and nature of the judicial authorities referred to in Articles 6(1) and 6(2) EAW FD are identical, although they exercise separate functions.**
  - The decision on the execution of an EAW, like that on the issue of an EAW, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection, including the guarantee of independence (paras 48–50).
  - The execution of an EAW is, just as the issue of such a warrant, capable of prejudicing the liberty of the person concerned (para 51).
  - Unlike the procedure for the issue of an EAW, for which there is a dual level of protection of fundamental rights, at the stage of the execution of the EAW, the intervention of the executing judicial authority constitutes the sole level of protection provided for by the EAW FD allowing the requested person to enjoy all the guarantees appropriate to the adoption of judicial decisions (paras 52 and 53).
- **Requirements for an ‘executing judicial authority’ in relation to decisions to execute EAWs or decisions to disapply the speciality rule.**
  - An authority that participates in the administration of criminal justice (paras 42 and 43, with reference to *OG and PI*).
  - An authority that is objective and independent (para 44, with reference to *OG and PI*).
  - Effective judicial protection.
    - Where the law of the executing Member State confers the competence to execute an EAW on a public prosecutor, that authority must exercise its responsibility under a procedure, which complies with the requirements inherent in effective judicial protection. This means that the decision of that authority must be capable of being subject, in that Member State, to an effective judicial remedy (paras 45 and 46, 54).

- It is for the Member States to ensure that their legal orders effectively safeguard the level of judicial protection required by the EAW FD, as interpreted by the CJEU's case-law. They should do by means of the procedural rules which they implement and which may vary from one system to another (para 55, with reference to *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors' Offices, Lyons and Tours)*).
- *Ratio legis* for applying the same regime: A decision to disapply the rule of speciality is distinct from that relating to the execution of an EAW and leads, for the person concerned, to effects distinct from those of the latter decision. However, such a decision is liable to prejudice the liberty of the person concerned since it may lead to a heavier sentence (paras 59–64).
- **Application to the case at hand.**
  - **Decision to execute an EAW:** In the Netherlands, the decision to execute the EAW lies with the court, whose status as 'judicial authority' is in no way disputed (paras 65 and 66).
  - **Decision to disapply the rule of speciality:** Under Dutch law, the public prosecutor took the decision to grant the consent in the context of the speciality rule. Since the public prosecutor may receive instructions in specific cases from the Dutch Minister for Justice, he or she does not constitute an 'executing judicial authority' (para 67). The fact that the consent given by the Public Prosecutor may be the subject of an action brought by the person concerned before a judge does not alter that conclusion (paras 68 and 69).

### Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, Judgment of 17 December 2020.

- See also *infra* 6 (human rights scrutiny).
- **Facts.** In August 2015 and February 2019, Polish courts issued EAWs against two Polish nationals for the purposes of conducting a criminal prosecution and executing a custodial sentence. The persons concerned were in the Netherlands. The Dutch court had doubts as to whether it should execute these EAWs. More specifically, it raised the question of the implications of the judgment in *Minister for Justice and Equality (Deficiencies in the system of justice)*. Because of recent developments, some of which have occurred after the issuance of the EAW in question, the Dutch court considered that the deficiencies in the Polish system of justice were such that the independence of all Polish courts and, consequently, the right of all individuals in Poland to an independent tribunal were at stake. In that context, the court was uncertain whether that finding is sufficient in itself to justify a refusal to execute an EAW issued by a Polish court, without there being any need to examine the impact of those deficiencies in the particular circumstances of the case. The court therefore referred the case to the CJEU.
- **Main questions.** If the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which existed at the time of issue of that warrant or which arose after that issue, may that authority deny the status of 'issuing judicial authority' to the court which issued that arrest warrant?
- **CJEU's reply.** **Systematic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, which existed at the time of issue of that warrant or which arose after that issue are insufficient, on their own, to consider that all courts of**

that Member State fail to fall within the concept of ‘issuing judicial authority’. The CJEU’s main arguments follow.

- Mutual recognition and mutual trust are the rule (paras 35–37, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*). An EAW must in principle be executed, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
- The term ‘judicial authority’ (Article 6(1) EAW FD) requires that the authority acts independently (para 38, with reference to *OG* and *PI*).
- Judicial independence forms part of the essence of the fundamental right to a fair trial and it is for each Member State that the independence of its judiciary is safeguarded (paras 39 and 40, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*).
- The existence of deficiencies does not necessarily affect every decision that the courts of that Member State adopt (para 42).
- Denying the status of ‘issuing judicial authority’ to all judges or courts of that Member State would extend the limitations that may be placed on the principles of mutual recognition and mutual trust beyond exceptional circumstances (para 43). It would also mean that courts of that Member State could no longer submit references to the CJEU for preliminary rulings (para 44).
- The CJEU’s *OG* and *PI* case-law according to which the public prosecutors’ offices of certain Member States fail, in the light of their subordinate relationship to the executive, to provide sufficient guarantees of independence to be regarded as ‘issuing judicial authorities’ cannot be transposed to Member States’ courts (paras 45–50).

### Case C-414/20 PPU, *MM*, Judgment of 13 January 2021.

- **Facts.** See *supra* under 3.2 (on national arrest warrant).
- **Main questions.** Does Article 6(1) EAW FD mean that the status of ‘judicial authority’ is conditional on the availability of a review by a court of the decision to issue the EAW and of the national decision upon which that warrant is based? In the absence under national law of any remedy to review the lawfulness of an EAW issued by public prosecutor, can the EAW FD, read in light of the right to an effective judicial remedy under Article 47 of the Charter, be interpreted to the effect that the national court called to review the lawfulness of a provisional detention order against a person surrendered in execution of an EAW has jurisdiction to decide on the validity of that EAW?
- **CJEU’s replies:** **The status of ‘issuing judicial authority’, within the meaning of Article 6(1) EAW FD, is not conditional on the availability of a review by a court of the decision to issue the EAW and of the national decision upon which that warrant is based. Where no judicial remedy is available in the issuing Member State to review the conditions under which an EAW is issued by an authority that, although participating in the administration of justice, is not in itself a court, the EAW FD, read in the light of the right to effective judicial protection, enshrined in Article 47 of the Charter, must be interpreted as meaning that a court, which is called upon to decide on the lawfulness of the provisional detention of a person surrendered in execution of an EAW, must declare its jurisdiction to review the conditions under which that warrant was issued where an action has been brought before it to challenge its validity in light of EU law.** The CJEU’s main arguments follow.
  - **On the notion of ‘issuing judicial authority’:**
    - The availability of a review by a court of the decision to issue an EAW by an authority that, although participating in the administration of justice, it is not

- itself a court, is not a condition to be regarded as a 'judicial authority' within the meaning of Article 6(1) EAW FD (para 44);
- The absence of such review is relevant for the purposes of assessing whether the requirements inherent in effective judicial protection are met (para 45, with reference to *AZ*).
  - **On the jurisdiction of the national court in the issuing State to review indirectly the validity of the EAW:**
    - Under Bulgarian law, a court called to review the legality of a provisional detention order issued against a person surrendered in execution of an EAW has no jurisdiction to indirectly rule on the legality of the EAW issued by a public prosecutor (paras 60 and 61);
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights. As regards the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection. The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 31, with reference to *OG and PI*):
      - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although 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 that meet in full the requirements inherent in effective judicial protection (para 32, with reference to *OG and PI*).
    - It is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement. They may vary from one system to another. Introducing a separate right of appeal against the decision to issue an EAW is just one possibility (paras 67 and 68).
    - According to Article 51(1) of the Charter, Member States must respect the Charter when implementing EU law, as it is the case where they implement the provisions of the EAW FD, including in relation to the judicial review that must be ensured against the decisions in relation to the EAW (para 71).
    - Where the procedural law of the issuing Member State does not provide for a separate remedy allowing a court to review the conditions under which an EAW is issued and its proportionality, neither before nor concomitantly with its adoption nor subsequently, the EAW FD, read in the light of the right to effective judicial protection, enshrined in Article 47 of the Charter, must be interpreted as meaning that a court which is called upon to give a ruling at a stage in the criminal proceedings subsequent to the surrender of the requested person must be able to review, indirectly, the conditions under which that warrant was issued where an action has been brought before it to challenge its validity (para 72);
    - This is the case where, as in the present case, a court is called, in the framework of proceedings aimed at reviewing the legality of provisional detention of a person, to rule indirectly on the lawfulness of the procedure for the issuing of the EAW against that person, and in particular on the existence of a '[national] arrest warrant or any other enforceable judicial decision having the same effect',



so far as this EAW has allowed the arrest of that person and the adoption of the subsequent provisional detention (para 73).

**Case C-648/20 PPU, PI, Judgment of 10 March 2021**

- See *supra* under 3.1 (on national arrest warrant).

## 4. Obligation to execute an EAW

The CJEU clarified that Article 1(2) EAW FD requires an executing judicial authority to take a decision on **any** EAW forwarded to it, even when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts (AY).

### Case C-268/17, AY, Judgment of 25 July 2018.

- See also *supra* 1 with regard to the admissibility and *infra* 7.3 with regard to the interpretation of *ne bis in idem*.
- **Facts.** See *supra* 1.
- **Main question.** Must Article 1(2) EAW FD be interpreted as requiring the executing judicial authority to adopt a decision on any EAW forwarded to it, including when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts, but the second EAW has been issued only on account of the indictment, in the issuing Member State, of the requested person?
- **CJEU's reply.** **Article 1(2) EAW FD must be interpreted to mean that, in such a scenario, the executing judicial authority is required to adopt a decision on any EAW forwarded to it.** The CJEU's main arguments follow.
  - **The wording of Article 1(2) EAW FD.** Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by the framework decision, and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein (para 33).
  - **Articles 15, 17 and 22 EAW FD.** An executing judicial authority that does not reply following the issue of an EAW and thus does not communicate any decision to the judicial authority that issued the EAW is in breach of its obligations under those provisions (paras 34 and 35).



## 5. Scope of the EAW

The CJEU clarified that in the context of Article 2 EAW FD the law of the **issuing** Member State is the frame of reference, in the version applicable to the facts giving rise to the case in which the EAW was issued (X). This applies both for assessing whether an act is punishable by a custodial sentence of a maximum of at least 12 months (A) and for assessing whether an act is to be considered a list offence (*Advocaten voor de Wereld*).

### Case C-303/05, *Advocaten voor de Wereld*, Judgment of 3 May 2007.

- See *supra* 1 (on the validity of the EAW FD).

### Case C-463/15 PPU, *A*, Order of 25 September 2015.

- **Facts.** The referring Dutch court was requested to execute an EAW issued by a Belgian public prosecutor seeking the arrest and surrender of A for the execution of a custodial sentence of 5 years for ‘the intentional assault and battery of a spouse causing incapacity for work’ and ‘the carrying of a prohibited weapon’. The referring court agreed in principle with the surrender for the first act but had doubts with regard to the execution of the EAW in respect of ‘the carrying of a prohibited weapon’, which under Dutch law is punishable only by a third-category fine. According to the Dutch EAW law, the acts alleged against the requested person must be subject to criminal sanctions in both Member States concerned **and** the maximum custodial sentence applicable to such acts must be at least 12 months in **both** Member States. The referring judge wonders whether a refusal based on such an interpretation is in accordance with Article 2(4) and Article 4.1 EAW FD.
- **Main question.** Do Articles 2(4) and 4.1 EAW FD permit the executing Member State to transpose those provisions into its national law in such a manner as to require that the act should be punishable under its law **and** that, under its law, a custodial sentence of a maximum period of at least 12 months is laid down for that act?
- **The CJEU’s reply.** **Articles 2(4) and 4.1 EAW FD do not permit an interpretation whereby the surrender is also made subject to the condition that the act is under the law of that executing Member State punishable by a custodial sentence of a maximum of at least 12 months.** The CJEU’s main arguments follow.
  - **The wording of Article 4.1 EAW FD.** The option to refuse execution under Article 4.1 EAW FD is limited to a situation in which an EAW relates to an act that is not included on the list in Article 2(2) EAW FD and does not constitute an offence under the law of the executing Member State (paras 24 and 25).
  - **The wording of other provisions of the EAW FD.** Neither Articles 2(4) and 4.1 EAW FD nor any other provisions thereof provide for the possibility of opposing the execution of an EAW concerning an act that, constituting an offence in the executing Member State, is not there punishable by a custodial sentence of a maximum of at least 12 months (para 27).
  - **General background and objectives of the EAW FD.** The general background of the EAW FD and the objectives that it pursues also confirm this finding (para 28).
  - **Issuing Member State’s law is the frame of reference.** As is clear from Article 2 EAW FD (paras 1 and 2), the EAW FD focuses, with regard to offences in respect of which an EAW may be issued, on the level of punishment applicable in the issuing Member State. The reason for this is that criminal prosecutions or the execution of a custodial sentence

or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State (para 29).

- **Difference with the extradition regime.** In contrast to the extradition regime which was removed and replaced by a system of surrender between judicial authorities, the EAW FD no longer takes account of the levels of punishments applicable in the executing Member States. This corresponds to the primary objective of the EAW FD of ensuring free movement of judicial decisions in criminal matters, within an area of freedom, security and justice (para 30).

### Case C-717/18, X, Judgment of 3 March 2020.

- **Facts.** In 2017, a Spanish court convicted X, inter alia, for acts committed in 2012 and 2013, constituting the offence of glorification of terrorism and humiliation of victims of terrorism under Article 578 of the Criminal Code in the version in force at the time of those acts. It imposed on him the maximum prison sentence of 2 years stemming from that version of the criminal law provision. In 2015, that provision was amended and now provides for a custodial sentence of a maximum of 3 years. In 2018, the Spanish court issued an EAW against X towards Belgium for the offence of ‘terrorism’, which features in the list of offences for which the double criminality check has been removed (Article 2(2) EAW FD). The executing Belgian court had doubts as to which version of Article 578 of the Spanish criminal code it had to take into account to verify whether the threshold of a custodial sentence for a maximum period of at least 3 years under Article 2(2) EAW FD was met. Should it consider the version applicable to the facts in the main proceedings or the version applicable at the date of issue of the EAW? It therefore referred the question to the CJEU.
- **Main question.** Is Article 2(2) EAW FD to be interpreted as meaning that, to ascertain whether the offence for which an EAW has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued or in the version in force at the date of issue of that arrest warrant?
- **The CJEU’s reply.** **Article 2(2) EAW FD must be interpreted as meaning that, to ascertain whether the offence for which an EAW has been issued is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years, as it is defined in the law of the issuing Member State, the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued.** The CJEU’s main arguments follow.
  - **The wording of Article 2(2) EAW FD is silent on this issue.** Article 2(2) EAW FD does not specify which version of the law of the issuing Member State must be taken into account where that law has been subject to amendments between the date of the facts giving rise to the case and the date of issue of the EAW (para 19).
  - **The context of Article 2(2) EAW FD and its consistent application with other provisions,** particularly Articles 2(1) and 8 EAW FD.
    - Article 2(1) EAW FD is relevant as it refers to the sentence actually imposed in accordance with the law of the issuing Member State applicable to the facts of that case. To hold that under Article 2(2) EAW FD the executing authority should take into consideration the law of the issuing Member State applicable at a different date would undermine the consistent application of those two provisions (paras 22–26).
    - Article 2(4) EAW is not relevant, especially given that it refers only to the law of the executing Member State (para 27).

- Article 8(1)(f) EAW FD provides that the EAW contains information on the penalty imposed, if there is a final judgment, which has to be set out in accordance with the form contained in Annex A. Under Section (c) point 2 of that form, the issuing judicial authority must provide information on the 'length of the custodial sentence or detention order imposed'. It follows from the very wording of Section (c) of that form and the term 'imposed' that the sentence is the one resulting from the version of the law of the issuing Member State which is applicable to the facts in question (paras 28–32).
- **The purpose of the EAW FD.** The EAW FD seeks to establish a simplified and more effective system for the surrender of convicted or suspected persons. If the law of the issuing Member State which the executing authority must take into account pursuant to Article 2(2) EAW FD was not the one applicable to the facts giving rise to the case in which the EAW was issued, the executing authority would be required to verify whether that law had not been amended subsequent to the date of those facts. This interpretation would run counter the purpose of EAW FD and, in view of the difficulties the executing authority might encounter in identifying the relevant versions of the law, it would be a source of uncertainty and be contrary to the principle of legal certainty (paras 35–38).
- **The executing judicial authority cannot simply refuse to execute the EAW but must assess the dual criminality.** The fact that the offence at issue cannot give rise to surrender without verification of double criminality pursuant to Article 2(2) EAW FD does not necessarily mean that the execution of the EAW has to be refused. The executing authority is under obligation to examine the criterion of double criminality in the light of that offence (paras 41 and 42).

## 6. Human rights scrutiny

In its case-law, the CJEU explained the impact that human rights can have in the context of the execution of an EAW. In a first set of judgments, the CJEU ruled on the right to be heard (*Radu*) and on the right to be present at trial in the context of *in absentia* judgments (*Melloni*), concluding that under those specific circumstances the execution of an EAW could not be refused on human rights grounds. In later judgments, the CJEU explicitly held that, in exceptional circumstances, an executing judicial authority must refrain from giving effect to an EAW if it finds that there exists, for the individual in respect of whom the EAW has been issued, a real risk of inhuman or degrading treatment (*Aranyosi and Căldăraru; ML (Conditions of detention in Hungary); Dorobantu*). The same applies if it finds that there is a real risk of breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial (*Minister for Justice and Equality (Deficiencies in the System of Justice), Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*).

**Two-step assessment.** In its case-law, the CJEU developed the two-stage examination that the executing judicial authority is required to perform before taking a decision on the execution of the EAW (*Aranyosi and Căldăraru; ML (Conditions of detention in Hungary); Dorobantu*). If there are elements that demonstrate a real risk of inhuman or degrading treatment, the court must first assess the existence of a general risk due to general detention conditions in the issuing Member State based on objective, reliable, specific and properly updated information (general assessment). Evidence of a real risk in relation to general detention conditions in the issuing Member State cannot, in itself, lead to a refusal to execute the EAW. If there is evidence available of a real risk in relation to general detention conditions, the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that the requested person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment (specific assessment).

**The specific assessment in relation to prison conditions** (*Aranyosi and Căldăraru; ML (Conditions of detention in Hungary); Dorobantu*). The CJEU held that the executing judicial authority must determine, specifically and precisely, that there are substantial grounds for believing that, following the requested person's surrender to the issuing Member State, he or she will run a 'real risk' of being subject in that Member State to inhuman or degrading treatment. It must rely on objective, reliable, specific and properly updated information. It must make an overall assessment of all the relevant physical aspects of the detention, e.g. the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within that prison. In the absence of EU minimum rules on detention conditions, the executing authority must take account of the criteria laid down in the ECtHR's case-law (e.g. *Muršić v Croatia*). The assessment should not be limited to obvious inadequacies only. The assessment must concern only the conditions in the detention centre in which the executing Member State will detain the requested person. The necessary supplementary information that the executing authorities may ask for from the issuing authorities (Article 15 EAW FD) plays an important role in the assessment. The CJEU recalled the possibility (and limits) for requesting necessary supplementary information pursuant to Article 15 EAW FD (see also *infra* 9) and underlined that, in principle, this should be done within

the time limits of Article 17 EAW FD (see also *infra* 8). If the issuing judicial authority gives or endorses an assurance ‘that the requested person will not suffer inhuman or degrading treatment’, the executing authority shall rely on this assurance, unless there are specific indications that the detention conditions in a particular detention centre are in breach of Article 4 Charter.

**The assessment in relation to the fundamental right to an independent tribunal.** The CJEU applied its two-step assessment also in relation to the fundamental right to an independent tribunal (*Minister for Justice and Equality (Deficiencies in the System of Justice)*, *Openbaar Ministerie (Indépendance de l’autorité judiciaire d’émission)*). The CJEU ruled that the existence of evidence of systemic or generalised deficiencies concerning judicial independence in Poland or of an increase in those deficiencies does not justify in itself the judicial authorities of the other Member States refusing to execute any EAW issued by a Polish judicial authority. However, the execution of the EAW must be refused if, having regard to the individual situation of the person concerned, the nature of the offence in question and the factual context in which that EAW has been issued, there are substantial grounds for believing that, on account of those deficiencies, that person will run a real risk of breach of his or her right to a fair trial once he or she is surrendered to those authorities.

**Higher national standards.** The CJEU noted in its case-law that Member States are entitled to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 Charter and Article 3 ECHR, as interpreted by the ECtHR. However, in the context of the EAW FD, a Member State may make the surrender to the issuing Member State of the person concerned by an EAW subject only to compliance with the latter requirements and not with those resulting from its own national law (*Dorobantu*). Similarly, in the context of *in absentia* judgments, the CJEU stated that, whenever the EU legislature adopted uniform standards of fundamental rights protection (exhaustive harmonisation), national courts cannot make the surrender conditional on the fulfilment of additional national requirements which are not foreseen in that EU legislation (*Melloni*).

### Case C-396/11, *Radu*, Judgment of 29 January 2013.

- **Facts.** German judicial authorities issued four EAWs for the surrender of Radu, a Romanian national, for the purposes of prosecution in respect of acts of aggravated robbery. Radu opposed his surrender and claimed *inter alia* a breach of the right to a fair trial and the right to be heard (Article 6 ECHR and Articles 47 and 48 Charter) on the ground that he had not been heard before the EAWs were issued. The Romanian court of appeal decided to stay the proceedings and referred a number of questions to the CJEU.
- **Main question.** Must the EAW FD, read in the light of Articles 47 and 48 Charter, be interpreted as meaning that the executing authority can refuse to execute an EAW for the purpose of prosecution on the ground that the issuing judicial authority did not hear the requested person before the EAW was issued?
- **The CJEU’s reply.** **The executing authority cannot refuse to execute the EAW on the ground that ‘the requested person was not heard in the issuing Member State before that arrest warrant was issued’.** The CJEU’s main arguments follow.
  - **The purpose of the EAW FD.** The EAW FD seeks to replace the multilateral system of extradition between Member States with a system of surrender between judicial

- authorities based on the principle of mutual recognition. It is aimed at facilitating and accelerating judicial cooperation (paras 33 and 34).
- **The exhaustive nature of the list of grounds for non-recognition.** The fact that the EAW has been issued for the purposes of conducting a criminal prosecution without the requested person having been heard by the issuing judicial authorities does not feature among these grounds (paras 36–38).
  - **Articles 47 and 48 Charter.** These provisions do not require that the executing judicial authority should be able to refuse to execute an EAW issued for the purpose of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authority before that EAW was issued (para 39).
  - **The effectiveness of the EAW system:**
    - an obligation for the issuing judicial authority to hear the requested person **before** the issuing of an EAW would lead to a failure of the surrender system and prevent the achievement of the area of freedom, security and justice (para 40);
    - the European legislature has ensured that the right to be heard will be observed in the executing Member State (paras 41 and 42).

### Case C-399/11, *Melloni*, Judgment of 26 February 2013.

- See also *infra* 7.4 (on *in absentia* judgments).
- **Facts.** Melloni was sentenced *in absentia* to 10 years imprisonment for bankruptcy fraud. An Italian court of appeal issued an EAW for the execution of this sentence. The Spanish executing court authorised the surrender. However, Melloni started constitutional review proceedings before the Spanish constitutional court claiming a breach of his right to a fair trial (Article 24(2) of the Spanish Constitution). The constitutional court had doubts whether the EAW FD precludes the Spanish court from making Melloni's surrender conditional on the right to have the conviction in question reviewed, and referred the case to the CJEU.
- **Main questions.** Is Article 4a(1) EAW FD compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial (Article 47 Charter) and the right of the defence (Article 48(2) Charter)? Does Article 53 Charter allow the executing Member State to make the surrender of a person convicted *in absentia* conditional on the conviction being open to review in the issuing Member State to avoid an adverse effect on the right to a fair trial and the right of the defence as guaranteed by the executing Member State's constitution?
- **The CJEU's reply.** **Article 4a(1) EAW FD is compatible with the requirements under Articles 47 and 48(2) Charter. Article 53 Charter does not allow that the surrender of a person convicted *in absentia* is made conditional on a national (constitutional) rule that requires the conviction to be open to review in the issuing Member State.** The CJEU's main arguments follow.
  - **The rights included in Articles 47 and 48(2) Charter are not absolute.** The right of the accused to appear in person at their trial is an essential component of the right to a fair trial but not an absolute right. The accused can waive this right provided that certain safeguards are met, i.e. that the waiver is established in an unequivocal manner, that it is accompanied by minimum safeguards commensurate to its importance and that it does not run counter to any important public interest (para 49). The ECtHR takes the same approach in relation to Articles 6(1) and 6(3) ECHR (para 50).
  - **Article 4a(1) EAW FD does not disregard the rights included in Articles 47 and 48(2) Charter.** Article 4a(1) lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, their right to be present at their trial (para 52).
  - **The scope of Article 53 Charter in the light of EU harmonisation:**

- under Article 53 Charter, national authorities and courts remain, in principle, free to apply higher national fundamental rights standards, but only if the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised (paras 58–60);
- Framework Decision 2009/299 effects a harmonisation of the conditions of execution of an EAW in the event of a conviction rendered *in absentia* (para 62);
- allowing a Member State to make the surrender conditional on the fulfilment of a requirement not foreseen under Framework Decision 2009/299 would cast doubt on the uniformity of the standard of fundamental rights protection as defined in the EAW FD and undermine the principles of mutual trust and recognition which the EAW FD purports to uphold, therefore compromising its efficacy (para 63).

### Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016.

- **Facts.** In the *Aranyosi* case, a Hungarian investigating judge issued two EAWs with respect to Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed by Aranyosi in Hungary. In the *Căldăraru* case, a Romanian court issued an EAW with respect to Căldăraru to secure the enforcement in Romania of a prison sentence of 1 year and 8 months imposed for driving without a driving licence. The German court, which had to decide whether those EAWs should be executed, believed that the detention conditions to which both men might be subject in the Hungarian and Romanian prisons, respectively, were contrary to fundamental rights.
- **Main questions.** Can or should, on the basis of Article 1(3) EAW FD, an executing judicial authority refuse to execute an EAW if there are serious indications that the detention conditions are not compatible with the fundamental rights, in particular Article 4 Charter? Does Article 1(3) and/or Articles 5 and 6(1) EAW FD mean that the executing judicial authority can or must make its decision conditional on the need for additional information that would assure that detention conditions are compliant?
- **The CJEU's reply.** **If there is objective, reliable, specific and updated information of generalised or systematic deficiencies of the detention conditions in the issuing Member State, the executing judicial authority must determine, specifically and precisely, whether there is a real risk. To that end, it must request supplementary information from the issuing judicial authority. On the basis of the information provided, it needs to assess whether a 'real risk' exists. It should then decide to execute the warrant (if there is no real risk) or to postpone the execution (if there is a real risk). If the existence of that 'real risk' cannot be discounted within a reasonable time, it must consider whether to bring the surrender procedure to an end.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the rule** (paras 75–80):
    - Articles 1(1) and 1(2) EAW FD and recitals 5 and 7 indicate that the EAW FD constitutes a completely new regime based on mutual recognition and mutual trust;
    - an EAW must in principle be executed unconditionally, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Exceptions to the rule are allowed only in exceptional circumstances** (paras 82–87):
    - in Opinion 2/13 on the accession of the EU to the ECHR, the CJEU already indicated that exceptions are possible;
    - Article 1(3) EAW FD underlines the duty to comply with the Charter;

- Article 4 Charter constitutes an absolute right and thus derogations are not permitted.
- **The Charter is the frame of reference** for assessing whether there is a real risk of inhuman or degrading treatment (para 88).
- **If there are elements that demonstrate a real risk of inhuman or degrading treatment, the following two-step assessment must be made** (paras 88–97).
  - **Existence of a general risk.** To assess whether there is a real risk of inhuman or degrading treatment due to general detention conditions in the issuing Member State, the executing authority needs to make its assessment on the basis of objective, reliable, specific and properly updated information. This information may be obtained from, for example, judgments of international courts, such as judgments from the ECtHR, judgments of courts of the issuing Member State and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. The deficiencies may be systemic or generalised or may affect certain groups of people or certain places of detention. Evidence of a real risk in relation to general detention conditions in the issuing Member State cannot, in itself, lead to a refusal to execute the EAW.
  - **Existence of a specific risk for the individual concerned.** If there is evidence available of a real risk in relation to general detention conditions, the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that the requested person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment. To that end, the executing authority must request of the issuing judicial authority all necessary supplementary information on the conditions in which the requested person will be detained (Article 15 EAW FD). It can also request information on the existence of mechanisms for monitoring detention conditions. In relation to this request, the issuing authority can set a timeline taking into account the time required to collect the information as well as the time limits set in the EAW FD (Article 17 EAW FD).
- **The obligation to postpone the execution of the EAW.** If the executing authority finds that there exists a concrete risk for the requested person, it must postpone the execution of the EAW. During the postponement, the requested person can either be held in custody or provisionally released, provided that it takes measures to prevent the person absconding (paras 98–101).
- **The final decision on the execution of the EAW.** If the executing judicial authority obtains supplementary information that permits it to discount the existence of a real risk that the requested person will be subject to inhuman and degrading treatment in the issuing Member State, it must adopt its decision on the execution of the EAW. If, however, the existence of such a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end (para 103).
- **In case of delays, Member States are, pursuant to Article 17(7) EAW FD, obliged to inform Eurojust and/or the Council** (para 99):
  - where the executing authority decides on a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) EAW FD, giving the reasons for the delay;
  - in addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of EAWs is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the EAW FD.



### Case C-220/18 PPU, *ML (Conditions of detention in Hungary)*, Judgment of 25 July 2018.

- **Facts.** In August 2017, the District Court in Hungary issued an EAW against ML, a Hungarian national, so that he could be prosecuted and tried for offences of bodily harm, damage, fraud and burglary committed in Hungary in 2016. By judgment of 14 September 2017, the District Court sentenced ML *in absentia* to a custodial sentence of 1 year and 8 months. By letter of 20 September 2017, the Hungarian Ministry of Justice informed the Bremen public prosecutor's office, in response to a request sent by the latter, that, if ML were surrendered, he would initially be detained, for the duration of the surrender procedure, in Budapest prison (Hungary) and thereafter in Szombathely regional prison (Hungary). The ministry also gave an assurance that ML would not be subjected to any inhuman or degrading treatment within the meaning of Article 4 Charter as a result of the proposed detention in Hungary. The ministry added that that assurance could equally well be given in the event of ML being transferred to another prison. On 31 October 2017, the District Court issued a further EAW in respect of ML, this time for the purpose of executing the custodial sentence imposed by that court on 14 September 2017. To assess the legality of the surrender from the point of view of detention conditions in Hungarian prisons, the German court considered it necessary to obtain additional information.
- **Main questions.** Must Articles 1(3), 5 and 6(1) EAW FD be interpreted as meaning that an executing judicial authority may rule out the existence of a 'real risk' merely because that person has, in the issuing Member State, a legal remedy enabling them to challenge the detention conditions? If that is not the case, is that authority then required to assess the detention conditions in **all** the prisons in which the person concerned could potentially be detained? Must the executing judicial authority assess all the detention conditions? May, in the context of that assessment, that authority take into account information such as, in particular, an assurance that the person concerned will not be subjected to inhuman or degrading treatment, provided by authorities of the issuing Member State other than the executing judicial authority?
- **The CJEU's reply.** **The executing judicial authority cannot rule out a 'real risk' merely because the person has, in the issuing Member State, a legal remedy permitting them to challenge the detention conditions. The executing judicial authority is required to assess only the detention conditions in the prisons in which, according to the available information, that person will be detained, including on a temporary or transitional basis. The executing judicial authority must assess solely the actual and precise detention conditions that are relevant for determining whether that person will be exposed to a 'real risk'. The executing judicial authority may take into account information such as, in particular, an assurance that the individual concerned will not be subject to inhuman or degrading treatment, provided by authorities of the issuing Member State other than the issuing judicial authority.** The CJEU's main arguments follow.
  - **Need for accurate and updated information.** Even though the CJEU is not questioned about the existence of systemic or generalised deficiencies, the CJEU underlines, in this regard, that the referring court must verify the accuracy of the available information on the basis of properly updated information (paras 67–71).
  - **The existence of a legal remedy cannot suffice on its own to rule out a real risk.** It does not exempt the executing judicial authority from undertaking an individual assessment of the situation of each person concerned (paras 72–76).
  - **The extent of the assessment of detention conditions** (paras 77–107).
    - **The prisons to be assessed.** The executing authority is solely required to assess the detention conditions in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis (paras 87–89):
      - the objective of the EAW FD is to facilitate and accelerate surrenders (para 82);

- the option available under Article 15(2) EAW FD to request necessary supplementary information is a last resort to which recourse may be had only in exceptional cases (para 79, with reference to *Piotrowski*);
- Member States are required to comply with the time limits of the EAW FD (para 83, with reference to *Piotrowski*);
- an obligation to assess the detention conditions in all the prisons in which the person might be detained is clearly excessive (para 84).
- **The assessment of the detention conditions** (paras 90–107).
  - If ill-treatment is to fall within the scope of Article 3 ECHR, it must attain a minimum level of severity, which depends on all the circumstances of the case, such as the duration of the treatment, the treatment's physical and mental effects and, in some cases, the sex, age and state of health of the victim (para 91, with reference to ECtHR, *Muršić v Croatia*).
  - In view of the importance attaching to the space factor in the overall assessment of detention conditions, a strong presumption of a violation of Article 3 ECHR arises when the personal space available to a detainee is below 3 m<sup>2</sup> in multi-occupancy accommodation (paras 92 and 93, with reference to ECtHR, *Muršić v Croatia*).
  - In the present case, the executing judicial authority must determine only whether the person concerned will be exposed to a real risk in Budapest prison (paras 94 and 95).
  - The fact that detention in Budapest prison is temporary or transitional does not, on its own, rule out all real risk of inhuman or degrading treatment within the meaning of Article 4 Charter (paras 96–100, with reference to ECtHR, *Muršić v Croatia*).
  - If the executing judicial authority considers that the information available to it is insufficient to allow it to adopt a surrender decision, it may request supplementary, necessary information in accordance with Article 15(2) EAW FD (para 101).
  - In the present case the executing authority had sent 78 questions to enquire about detention conditions in Budapest prison and in any other facility in which the person concerned might be held (para 102). Those questions, because of their number, their scope (every prison in which the person concerned might be held) and their content (aspects of detention that are of no obvious relevance for the purposes of that assessment, such as, for example, opportunities for religious worship, whether it is possible to smoke, the arrangements for the washing of clothing and whether there are bars or slatted shutters on cell windows) make it, in practice, impossible for the authorities of the issuing Member State to provide a useful answer, given, in particular, the short time limits laid down in Article 17 EAW FD.
  - A request of that nature, which results in the operation of the EAW being brought to a standstill, is not compatible with the duty of sincere cooperation (Article 4(3) of the Treaty of European Union (TEU)), which must inform the dialogue between the executing and issuing judicial authorities when, inter alia, information is provided pursuant to Articles 15(2) and 15(3) EAW FD (para 104).
- **The taking into account of assurances given by the authorities of the issuing Member State** (paras 108–115):
  - in accordance with Articles 15(2) and 15(3) EAW FD and Article 4(3) TEU, the executing judicial authority and the issuing judicial authority

may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State (paras 108–110);

- the assurance provided by the competent authorities of the issuing Member State is a factor that the executing judicial authority cannot disregard (para 111);
- when that assurance has been given, or at least endorsed, by the issuing judicial authority, the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 Charter (para 112);
- when, as in the present case, the assurance was neither provided nor endorsed by the issuing judicial authority, it must be evaluated by carrying out an overall assessment of all the information available to the executing judicial authority (paras 113 and 114);
- in the present case, the assurance given by the Hungarian Ministry of Justice appears to be borne out by the information in the possession of the German public prosecutor's office and, that being so, it appears that the person concerned may be surrendered to the Hungarian authorities without any breach of Article 4 Charter, a matter that must, however, be verified by the referring court (para 115).

### **Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, Judgment of 25 July 2018.**

- **Facts.** In February 2012, June 2012 and September 2013, Polish courts issued three EAWs against LM for the purpose of conducting criminal prosecutions, inter alia for trafficking in narcotic drugs. In May 2017, LM was arrested in Ireland on the basis of those EAWs and brought before the referring court, the High Court of Ireland. He informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them. In support of his opposition to being surrendered, he submitted that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR (right to a fair trial) and relied, in particular, on the reasoned proposal, submitted by the European Commission, on 20 December 2017, in accordance with Article 7(1) TEU.
- **Main question.** Notwithstanding *Aranyosi and Căldăraru*, where a national court determines that there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where the individual's trial will take place within a system no longer operating within the rule of law?
- **The CJEU's reply.** **Article 1(3) EAW FD must be interpreted as meaning that, where the executing judicial authority has material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47(2) Charter on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to the individual's personal situation, as well as to the nature of the offence for which they are being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State**

pursuant to Article 15(2) EAW FD, as amended, there are substantial grounds for believing that that individual will run such a risk if they are surrendered to that Member State. The CJEU's main arguments follow.

- **Mutual recognition and mutual trust are the rule** (paras 36–42). An EAW must in principle be executed, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
- **Limitations** may be placed on the principles of mutual recognition and mutual trust in **exceptional circumstances** on the basis of Article 1(3) EAW FD (paras 43–45, with reference to *Aranyosi and Căldăraru*).
- A real risk of breach of the fundamental **right to an independent tribunal** and, therefore, of the essence of the fundamental **right to a fair trial (Article 47(2) Charter)** is capable of permitting the executing judicial authority to **refrain**, by way of exception, **from giving effect to an EAW** (paras 48–58 with reference to Case C-64/16 *Associação Sindical dos Juízes Portugueses*).
- **Two-stage examination** (paras 60–68, with reference to *Aranyosi and Căldăraru*).
  - **First step: the ‘systemic’ assessment.** The authority must assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment (para 61).
  - **No automatic suspension of the EAW system where there is a reasoned proposal of the Commission.** It is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU with a view to application of the EAW mechanism being suspended in respect of that Member State (para 71). It is only if the European Council were to adopt a decision as provided for in Article 7(2) TEU and the Council were then to suspend the EAW FD in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment (para 72). Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) EAW FD, to give effect to an EAW issued by a Member State that is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances and after carrying out a specific and precise assessment of the particular case (para 73).
  - **Second step: the ‘specific’ assessment.** The authority must **assess specifically and precisely** whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the individual’s surrender to the issuing Member State, **the requested individual will run that risk** (paras 68 and 73). In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies are liable to have an impact at the level of that Member State’s courts with jurisdiction over the proceedings to which the requested individual will be subject (para 74). If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by the individual, whether there are substantial grounds

for believing that the individual will run a real risk of breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial, having regard to their personal situation, as well as to the nature of the offence for which the individual is being prosecuted and the factual context that forms the basis of the EAW (para 75). The executing authority must also take into account the information provided by the issuing authority on the basis of Article 15(2) EAW FD (paras 76 and 77).

### Case C-128/18, *Dorobantu*, Judgment of 15 October 2019.

- **Facts.** In August 2016, German authorities received an EAW from Romania for the surrender of Dorobantu, a Romanian national, residing in Germany. The EAW was issued for the purposes of conducting a criminal prosecution in respect of offences relating to property and to forgery and the use of forged documents. In accordance with the *Aranyosi and Căldăraru* case-law, **the German court requested additional information from the Romanian authorities. In January 2017, the German authorities decided to authorise the surrender. However, shortly afterwards, the German Federal Constitutional Court set aside this decision. It ruled that the assessment as to the legality of Dorobantu's surrender required a request for a preliminary ruling to the CJEU in relation to the factors relevant to the assessment of the detention conditions in the issuing Member State.**
- **Main questions.** What is the extent and scope of the review which the executing judicial authority must undertake to assess whether a person will run a 'real risk' of being subject to inhuman or degrading treatment within the meaning of Article 4 Charter (comprehensive review or limited to manifest inadequacies)? Must the executing authority take account of a minimum requirement as to space per detainee in a prison cell and, if so, what would be the rules on calculating that space? Must the executing authority for the purposes of that assessment take into account the existence of legislative and structural measures relating to the improvement of the review of detention conditions in the issuing Member State? May the executing authority weight the issuing Member State's failure to comply with the minimum requirements in relation to detention conditions against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition?
- **The CJEU's reply.** **The executing judicial authority must take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 Charter. As regards, in particular, the personal space available to each detainee, the executing judicial authority, in the absence, currently, of minimum standards in that respect under EU law, must take account of the minimum requirements under Article 3 ECHR. The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of their detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions. A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk cannot be weighed, for the purposes of**

**deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.** The CJEU's main arguments follow.

- **The executing judicial authority must determine, specifically and precisely, whether there are substantive grounds for a real risk in the specific case at hand.**
  - In the present case, the referring court found that there was specific evidence of systemic and generalised deficiencies in detention conditions in Romania. It is for the referring court to verify the accuracy by taking account of properly updated information (para 53, with reference to *ML (Conditions of detention in Hungary)*).
  - The mere existence of evidence that there are deficiencies does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment if the individual is surrendered (para 54, with reference to *Aranyosi and Căldăraru*).
  - The executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, that person will run a real risk of being subject in that member State to inhuman or degrading treatment within the meaning of Article 4 Charter (para 55, with reference to *Aranyosi and Căldăraru* and *ML (Conditions of detention in Hungary)*).
  - The interpretation of Article 4 Charter corresponds, in essence, to the meaning conferred on Article 3 ECHR by the ECtHR. The ECtHR has ruled that a court of a Member State party to the ECHR could not refuse to execute an EAW on the ground that the requested person was exposed to a risk of being subjected, in the issuing Member State, to detention conditions involving inhuman or degrading treatment if that court had not first carried out an up-to-date and detailed examination of the situation as it stood at the time of its decision and had not sought to identify structural deficiencies in relation to detention conditions and a risk, that is both real and specific to the individual, of infringement of Article 3 ECHR in that Member State (with reference to ECtHR, *Romeo Castaño v Belgium*).
- **The executing judicial authority must assess all the relevant physical aspects of the detention, but only in relation to the prison in which it is actually intended that that person will be detained:**
  - the meaning and scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR but also by the case-law of the ECtHR and by that of the CJEU (para 58);
  - to fall within the scope of Article 3 ECHR, ill-treatment must attain a minimum level of severity (para 59, with reference to *ML (Conditions of detention in Hungary)*);
  - the review must be based on an overall assessment of all the relevant physical aspects of the detention, e.g. the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison (paras 61 and 85);
  - the assessment is not limited to obvious inadequacies only because the prohibition of inhuman or degrading treatment is absolute (para 62, with reference to *Aranyosi and Căldăraru*);

- the executing judicial authority must, pursuant to Article 15(2) EAW FD, request all necessary supplementary information regarding the detention conditions (para 67, with reference to *ML (Conditions of detention in Hungary)*);
  - the assessment must concern the conditions only in the detention centre in which it is actually intended that the requested person will be detained (paras 63–67, with reference to *ML (Conditions of detention in Hungary)*);
  - in principle, the executing judicial authority must rely on the assurance given or endorsed by the issuing judicial authority stating that the requested person will not suffer inhuman or degrading treatment because of the actual and precise detention conditions (paras 68 and 69, with reference to *ML (Conditions of detention in Hungary)*).
- **The executing judicial authority must follow the ECtHR’s case-law when assessing and calculating the required minimum personal space in a multi-occupancy cell.**
    - In the light of Article 52(3) Charter, and in the absence of minimum EU standards on detention conditions, the CJEU relies on the case-law of the ECtHR in relation to Article 3 ECHR (paras 71 and 77, with reference to ECtHR, *Muršić v Croatia*).
    - If the personal space available to a detainee is below 3 m<sup>2</sup> in multi-occupancy accommodation, there is a strong presumption of a violation of Article 3 ECHR. If the personal space is in the range of 3–4 m<sup>2</sup>, the space factor remains an important factor in the assessment of the adequacy of detention. If a detainee has more than 4 m<sup>2</sup> of personal space, and therefore no issue with regard to the question of personal space arises, other aspects of physical detention conditions remain relevant to the assessment of adequacy of an individual’s detention conditions under Article 3 ECHR (paras 72–76, with reference to *ML (Conditions of detention in Hungary)* and ECtHR, *Muršić v Croatia*).
    - The calculation of the space should not include sanitary facilities but should instead include the space occupied by furniture, provided that the detainee still has the possibility of moving around normally within the cell (para 77, with reference to ECtHR, *Muršić v Croatia*).
    - It is for the referring court to assess all relevant circumstances for the purposes of the analysis it is required to make, if necessary by asking the issuing judicial authority for the necessary supplementary information (para 78).
    - It is open to the Member States to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 Charter and Article 3 ECHR, as interpreted by the ECtHR. However, in the context of the EAW FD, a Member State may make the surrender to the issuing Member State of the person concerned by an EAW subject only to compliance with the latter requirements and not with those resulting from its own national law (para 79, with reference to *Melloni*).
  - **The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because there is a legal remedy enabling the person to challenge the detention conditions or because there are legislative or structural measures intended to reinforce the monitoring of detention conditions** (paras 80 and 81, with reference to *ML (Conditions of detention in Hungary)*).
  - **The executing judicial authority cannot, when deciding on the surrender, weight the finding of a ‘real risk’ against considerations relating to the efficacy of judicial cooperation and to the principles of mutual trust and recognition** (paras 82–84).

**Joined Cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*, Judgment of 17 December 2020.**

- **Facts.** See *supra* section 3.3 (judicial authority).
- **Main questions.** If the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, may that authority presume that there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by Article 47(2) Charter? Can the executing authority presume this without carrying out a specific and precise verification, which would take account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context surrounding the issuing of that warrant?
- **CJEU's reply.** **Articles 6(1) and 1(3) EAW FD must be interpreted as meaning that the executing judicial authority cannot presume that there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial, without carrying out a specific and precise verification. This verification must take account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.** The CJEU's main arguments follow.
  - **CJEU confirms the two-step examination set out in *Minister for Justice and Equality (Deficiencies in the system of justice)*.**
    - The possibility of refusing to execute an EAW based on Article 1(3) EAW FD presupposes a two-step examination (paras 53–55, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*).
    - In the absence of a formal decision of the Council under Article 7 TEU, an executing judicial authority cannot refuse automatically to execute an EAW, without having to carry out any specific assessment (paras 57–60, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*).
    - An automatic refusal would also go against one of the main objectives of the EAW mechanism, which is to combat impunity (paras 62–64).
    - An executing judicial authority that is aware of indications that there are indications of systemic or generalised deficiencies or that there has been an increase in such deficiencies must be vigilant. However, the authority cannot rely on that finding alone in order to refrain from carrying out the second step of the examination (para 60).
    - In the context of the second step, the executing authority must assess if there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing after surrender to the issuing Member State. The authority must consider the following factors (para 61, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*):
      - The personal situation of the requested person;
      - The nature of the offence;
      - The factual context in which that arrest warrant has been issued, such as statements by public authorities, which are liable to interfere with the handling of an individual case;
      - The information that the issuing judicial authority may have communicated to it pursuant to Article 15(2) EAW FD.
    - If an EAW is for the purpose of prosecution, the executing judicial authority must examine in particular to what extent the systemic or generalised



- deficiencies are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject. That examination therefore involves taking into consideration the impact of such deficiencies, which may have arisen after the issue of the EAW concerned (para 66).
- If an EAW is for the purpose of the execution of a custodial sentence, the executing judicial authority must examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the EAW have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that EAW (para 68).
- **CJEU recalls the consequences that follow from the outcome of the two-step examination.**
- If the executing authority finds there are substantial grounds for believing that the person will run a real risk, the executing judicial authority must refrain, pursuant to Article 1(3) EAW, from giving effect to the EAW (para 61).
  - Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) EAW FD (para 61).



## 7. Refusal grounds

The CJEU has repeatedly held that the executing judicial authority may only refuse to execute an EAW in the exhaustively listed cases of mandatory non-execution, as laid down in Article 3 EAW FD, or of optional non-execution, as laid down in Articles 4 and 4a EAW FD. Despite the 'exhaustive' nature of the list of refusal grounds, the CJEU's case-law has revealed that there are other exceptional circumstances where the executing authorities should refrain from executing EAWs, for instance in the context of the validity of the EAW (*Bob-Dogi*; see *supra* 3) or in case of human rights issues (*Aranyosi and Căldăraru* and other judgments; see *supra* 6).

So far, the CJEU has provided interpretation with regard to the following refusal grounds and guarantees: minors (*Piotrowski*), national residents and persons staying in the executing Member State (*Kozłowski*; *Wolzenburg*; *Lopes Da Silva Jorge*; *Popławski I*; *Sut*; *Popławski II*), *ne bis in idem* (*Mantello*; *AY*) and *in absentia* judgments (*IB*; *Melloni*; *Dworzecki*). Although in the context of the EAW FD the CJEU has not yet given a ruling on the refusal ground of a lack of dual criminality (Article 4(1) EAW FD), it is worth noting that in *Grundza*<sup>2</sup> the CJEU interpreted the refusal ground of a lack of dual criminality in the context of Framework Decision 2008/909/JHA<sup>3</sup>.

The CJEU also clarified that a notification by a Member State of its intention to withdraw from the EU does not have the consequence that the execution of an EAW issued by that Member State must be refused or postponed (*RO*).

### 7.1. Minors

#### Case C-367/16, *Piotrowski*, Judgment of 23 January 2018.

- **Facts.** In 2014, a Polish court issued an EAW against *Piotrowski*, a Polish national residing in Belgium, with a view to his surrender to the Polish authorities for the execution of the sentences imposed by two judgments (one of 2011 and one of 2012). In 2016, the investigating judge of the Belgian court ordered that *Piotrowski* be detained with a view to his surrender to Poland for the purpose of the execution of the judgment of 2012. In that order, the investigating judge took the view that the EAW issued by the Polish court could not be executed insofar as the judgment of 2011 was concerned because *Piotrowski* was 17 years old when he committed the offence. The competent Belgian public prosecutor appealed against that order, as a minor over the age of 16 may be the subject of an EAW issued by the Belgian authorities if the Juvenile Court has declined to hear the case, pursuant to the Belgian law on youth protection.
- **Main questions.** Must Article 3(3) EAW FD be interpreted as meaning that surrender can be granted only in respect of persons who are regarded as having attained the age of majority under the law of the executing Member State, or does that provision allow the executing Member State

<sup>2</sup> Case C-289/15, *Grundza*, Judgment of 11 January 2017. In this judgment, the CJEU held, in para 54, that 'Article 7(3) and Article 9(1)(d) of Framework Decision 2008/909 must be interpreted as meaning that the condition of double criminality must be considered to be met in a situation such as that in the main proceedings, where the factual elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State'.

<sup>3</sup> Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

also to grant the surrender of minors who, on the basis of national rules, can be held criminally responsible from a certain age and subject to certain conditions?

- **The CJEU's reply.** Article 3(3) EAW FD is to be interpreted as meaning that the judicial authority of the executing Member State must refuse to surrender only those minors who are the subject of an EAW and who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based. To decide whether a minor is to be surrendered, the executing judicial authority must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State, without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor are specifically subject under the law of that Member State. The CJEU's main arguments follow.
- **The wording of Article 3(3) EAW FD.** The ground for non-execution laid down in that provision does not cover minors in general but refers only to those who have not reached the age required, under the law of the executing Member State, to be regarded as criminally responsible for the acts on which the EAW issued against them is based (para 29).
  - **The purpose of Article 3(3) EAW FD.** The EU legislature intended to exclude from surrender not all minors but only those persons who, on account of their age, cannot be the subject of any criminal prosecution or conviction in the executing Member State in respect of the acts in question, giving that Member State, in the absence of harmonisation in this field, the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible for such acts (para 30).
  - **The context and overall scheme of Article 3(3) EAW FD and the objective pursued by the EAW FD.** The refusal to execute an EAW is intended to be an exception which must be interpreted strictly (para 48). Article 3(3) EAW FD cannot be interpreted as enabling the executing judicial authority to refuse to give effect to such a warrant on the basis of an analysis for which no express provision is made (para 51). Moreover, such an analysis would in fact amount to a substantive re-examination of an analysis previously conducted in the issuing Member State and would infringe and render ineffective the principle of mutual recognition (para 52). The objective of the EAW FD was to establish a simplified and more efficient system for the surrender of persons which implies, inter alia, that Member States are required to comply with the time limits for adopting decisions relating to an EAW (Article 17 EAW FD) (paras 55 and 56) and that recourse to Article 15 EAW FD (requests for necessary, supplementary information) may be had only as a last resort in exceptional cases (para 61).

## 7.2. Nationals, residents and persons staying in the executing Member State

The rulings summarised under the present chapter relate to the application of Article 4(6) EAW FD. This provision allows the executing judicial authority to refuse to execute an EAW if it has been issued for the purposes of the execution of a custodial sentence or detention order where the requested person is staying in, or is a national or a resident of, the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. In these judgments, the CJEU held that the terms 'resident' and 'staying in' are autonomous concepts of EU law (*Kozłowski*; *Wolzenburg*). It also clarified the margin of discretion for national authorities and explained which criteria the authorities must take into consideration for the interpretation of these terms. The CJEU further held that Article 4(6) presupposes an

actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person. The mere fact that that a Member State declares itself 'willing' to execute the sentence cannot be regarded as justifying such a refusal (*Popławski I*; *Popławski II*). The fact that the offence on which the EAW is based is, under the law of the executing Member State, punishable by fine only is not an obstacle, provided that that fact does not prevent the custodial sentence imposed on the requested person from being enforced (*Sut*). The CJEU also clarified that Article 4(6) EAW FD should be interpreted in the light of the principle of non-discrimination on the basis of nationality (Article 18 TFEU) (*Lopes Da Silva Jorge*).

### Case C-66/08, *Kozłowski*, Judgment of 17 July 2008.

- **Facts.** A Polish issuing judicial authority sent an EAW to a German executing judicial authority to surrender Kozłowski for the purposes of the execution of a sentence of 5 months imposed on him by a Polish court. The German court, when assessing possible grounds for refusal, had doubts whether Kozłowski's habitual residence was Germany and therefore referred the case to the CJEU.
- **Main question.** What is the scope of the terms 'resident' and person 'staying' contained in Article 4(6) EAW FD?
- **The CJEU's reply.** **Article 4(6) EAW FD is to be interpreted to the effect that a requested person is 'resident' in the executing Member State when the person has established their actual place of residence there and is 'staying' there when, following a stable period of presence in that Member State, the person has acquired connections with that Member State which are of a similar degree to those resulting from residence. To ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of that person's presence and the family and economic connections which that person has with the executing Member State.** The CJEU's main arguments follow.
  - **Autonomous concepts of EU law.** The interpretation of the terms 'staying' and 'resident' cannot be left to the assessment of each Member State. They are autonomous concepts of EU law that must be given a uniform interpretation throughout the EU (paras 41–43).
  - **Meaning of 'resident'.** The requested person is 'resident' in the executing Member State when the requested person has established their actual place of residence there (para 46).
  - **Meaning of 'staying'.** The requested person is 'staying' in the executing Member State when, following a stable period of presence in that Member State, the requested person has acquired certain connections with that Member State which are of a similar degree to those resulting from residence. To ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying', it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of the person's presence and the family and economic connections which that person has with the executing Member State (paras 46–49). The fact that the person systematically commits crimes in the executing Member State and the fact that the person is in detention there serving a custodial sentence are not relevant factors for the executing judicial authority when it initially has to ascertain whether the person concerned is 'staying' within the

meaning of Article 4(6) EAW FD (para 51). By contrast, such factors may, supposing that the person concerned is 'staying' in the executing Member State, be of some relevance for the assessment which the executing judicial authority is then called on to carry out to decide whether there are grounds for not implementing an EAW (para 51).

### Case C-123/08, *Wolzenburg*, Judgment of 6 October 2009.

- **Facts.** A German issuing judicial authority sent an EAW to a Dutch executing judicial authority to surrender Wolzenburg, a German citizen, for the purposes of the execution of a sentence of 1 year and 9 months imposed on him by a German court. Wolzenburg established his principal residence for just over 1 year in the Netherlands, where he lived with his wife and where he was exercising a professional activity. The Dutch court is hesitant about refusing the EAW on the basis of Article 6 of the Dutch law on the surrender of persons, which is the Dutch implementation of Article 4(6) EAW FD. According to the Dutch law, a foreign person can benefit from an application of this ground for non-recognition only when two conditions are met: (i) they are in the possession of a residence permit of indefinite duration and (ii) they have been lawfully resident in the Netherlands for a continuous period of 5 years. Wolzenburg did not fulfil either of these criteria.
- **Main question.** Can the refusal ground of Article 4(6) EAW FD be made subject to possession of a residence permit of indefinite duration and to a continuous, lawful residence period of 5 years in the executing Member State, while the refusal ground is applied automatically to nationals?
- **CJEU's reply.** **A national legislation that applies the ground included in Article 4(6) EAW FD automatically to its own nationals while it requires a lawful residence for a continuous period of 5 years for non-nationals is compatible with the principle of non-discrimination on grounds of nationality. However, a national legislation that makes the application of Article 4(6) EAW FD subject to supplementary administrative formalities, such as a residence permit of indefinite duration, is not compatible with this principle.** The CJEU's main arguments follow.
  - **Applicability of the principle.** The principle of non-discrimination on grounds of nationality applies to the present case where a national of one Member State who is lawfully resident in another Member State is subject to an EAW in the latter Member State (paras 42–47).
  - **The requirement of a lawful residence for a continuous period of 5 years for non-nationals is compatible because it:**
    - pursues a legitimate objective – reintegration in society (paras 67 and 68);
    - is proportionate (paras 69–73).
  - **Supplementary administrative formalities, such as, in particular, a residence permit of indefinite duration, are not compatible as:**
    - Article 19 of Directive 2004/38 does not require EU citizens who have acquired a right of permanent residence in another Member State to hold a residence permit of indefinite duration (para 50);
    - a residence permit has only declaratory and probative force and does not give rise to any right (para 51).

### Case C-42/11, *Lopes Da Silva Jorge*, Judgment of 5 September 2012.

- **Facts.** In 2006, a Portuguese court issued an EAW against Lopes Da Silva Jorge, a Portuguese citizen, for the execution of a 5 years' imprisonment sentence. Subsequently, Lopes Da Silva Jorge moved to France, where, after a few years, he married a French national with whom he has been resident in French territory ever since. He was also employed as a long-distance lorry driver in France under an open-ended contract. In 2010, a French court proceeded to give effect to the EAW. Lopes Da Silva Jorge asked the French court not to execute the EAW and to order his

sentence of imprisonment to be served in France. However, the French court noted that Article 695-24 of the French Code of Criminal Procedure, which implements Article 4(6) EAW FD, applies only to French nationals, and therefore decided to refer the case to the CJEU.

- **Main questions.** What is the margin of discretion left to Member States when implementing Article 4(6) EAW FD? Is Article 695-24 of the French Code of Criminal Procedure compatible with the principle of non-discrimination on grounds of nationality (Article 18 TFEU)?
- **CJEU's reply. Article 4(6) EAW FD must be interpreted as meaning that, although a Member State may decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory irrespective of their connections with it. The national court is required, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, to interpret that law, so far as possible, in the light of the wording and the purpose of the EAW FD, with a view to ensuring that that framework decision is fully effective and to achieving an outcome consistent with the objective pursued by it.** The CJEU's main arguments follow.
  - **An automatic and absolute exclusion of nationals of other Member States residing or staying in its territory, irrespective of their connections with it, is not allowed:**
    - Member States have a certain margin of discretion when implementing Article 4(6) EAW FD (para 33);
    - however, the terms 'resident' and 'staying' are autonomous concepts of EU law and thus the margin of discretion is subject to limits (paras 35–39):
      - Member States cannot give those terms a broader meaning than that which derives from a uniform interpretation;
      - Member States must give those terms a meaning that complies with Article 18 TFEU:
        - Member States must take into account the social reintegration objective of Article 4(6) EAW FD (paras 32 and 40), meaning that nationals and nationals of another Member State that are integrated into the society should, as a rule, not be treated differently (para 40);
        - the alleged impossibility, in the Member State of execution, of enforcing a custodial sentence imposed in another Member State on a non-French national cannot justify the difference in treatment between such a national and a French national arising from the fact that the ground for optional non-execution laid down in Article 4(6) EAW FD is reserved exclusively to French nationals (para 49).
  - **Obligation to interpret, so far as possible, the whole body of domestic national law in the light of the wording and purpose of the EAW FD:**
    - the obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU because it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (paras 53 and 54, with reference to *Pupino* and other case-law);
    - limitations to this duty: general principles of law and no interpretation of national law *contra legem* (paras 55–57).

### Case C-579/15, *Popławski*, Judgment of 29 June 2017 (*Popławski I*).

- **Facts.** In 2007, a Polish court gave *Popławski*, a Polish national, a 1-year suspended prison sentence. In 2010, the Polish court ordered the enforcement of that custodial sentence. In 2013,

an EAW was issued with a view to enforcement of that sentence. By that time, Popławski had become a 'resident' in the Netherlands within the meaning of Article 4(6) EAW FD. Article 4(6) EAW FD has been transposed in Dutch law in Article 6 of the Dutch Surrender of Persons Act (*Overleveringswet*, hereinafter OLW). The District Court of Amsterdam considered applying this ground for non-execution but had doubts whether Article 6(2) to (4) OLW was compatible with Article 4(6) EAW FD. The District Court noted that, under the OLW, an executing judicial authority is obliged to refuse surrender for purposes of executing a sentence of a national or resident of the executing Member State. That refusal gives rise to a mere 'willingness' to take over the execution of the custodial sentence. A positive decision is dependent on the application of the Convention on the Transfer of Sentenced Persons or another applicable convention. This requires Poland to make a request. However, Polish legislation precludes such a request in situations where the person concerned is a Polish national. Under the OLW, there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over the execution of that sentence, while that risk does not affect the obligation to refuse surrender.

- **Main questions.** May a Member State transpose Article 4(6) EAW FD in a way that, on the one hand, it includes an obligation to refuse to surrender, but, on the other, it makes the final decision to take over the sentence dependent on the fulfilment of some conditions (particularly a basis for that decision in a treaty or convention)? Can the national courts apply the provisions of the EAW FD directly, and, in the case of an affirmative answer, is Article 4(6) sufficiently precise and unconditional? May a Member State whose national law requires that the taking over of the execution of the foreign custodial sentence must be based on an appropriate treaty or convention transpose Article 4(6) in its national law in such a way that that provision itself provides the required conventional basis? May a Member State transpose Article 4(6) in such a way that, for refusal of surrender for purposes of executing a sentence in respect of a resident, it sets the condition that the executing Member State must have jurisdiction in respect of the offences cited in the EAW and that there must be no actual obstacles in the way of a criminal prosecution in the executing Member State of that resident in respect of those offences, whereas it does not set such a condition in respect of nationals of the executing Member State?
- **CJEU's reply.** **Article 4(6) EAW FD precludes legislation of a Member State implementing that provision which, first, does not authorise such a surrender and, second, merely lays down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged. The provisions of the EAW FD do not have direct effect. However, the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of that framework decision. Article 4(6) EAW FD does not authorise a Member State to refuse to execute an EAW, issued with a view to the surrender of a person who has been finally judged and given a custodial sentence, on the sole ground that that Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced. The CJEU's main arguments follow.**
  - A national legislation which obliges the executing authority to refuse the surrender of a resident without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence, cannot be regarded as compatible with the EAW FD:
    - the execution of the EAW constitutes the rule and refusals to execute are exceptions, which must be interpreted strictly (para 19);

- Article 4(6) provides that the executing judicial authority ‘may’ refuse to execute an EAW if that Member State ‘undertakes’ to enforce that sentence in accordance with its domestic law (para 20);
- the executing judicial authority must have a margin of discretion whether or not it is appropriate to refuse to execute the EAW, taking into account the objective of that ground for optional non-execution (the possibility of increasing the requested person’s chances of reintegration into society) (para 21);
- any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence; the mere fact that the Member State declares itself ‘willing’ to execute the sentence cannot be regarded as justifying such a refusal (para 22).
- **The provisions of the EAW FD do not have direct effect** (paras 26 and 27).
- **The competent national court is obliged to interpret the provisions of national law, so far as is possible, in the light of the wording and purpose of the EAW FD:**
  - this obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU because it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (para 31, with reference to *Ognyanov* and other case-law);
  - limitations to this duty: general principles of law and no interpretation of national law *contra legem* (paras 32 and 33);
  - the obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of the EAW FD, and national courts must, where necessary, disapply, on their own authority, the interpretation adopted by the national supreme court if that interpretation is incompatible with EU law (paras 35 and 36, with reference to *Ognyanov*);
  - it is for the referring court alone to assess whether Dutch law, and particularly the requirement of ‘a treaty or another applicable convention’, may be interpreted to the effect that it puts the EAW FD on the same footing as the formal legal basis required by Article 6(3) OLW (para 39);
  - however, the CJEU may provide guidance (para 40) and holds that, in the light of the EAW FD, it is not inconceivable that the EAW FD could be placed on the same footing as such a convention (paras 41 and 42);
  - in the present case, the duty to interpret the domestic law in the light of the wording and purpose of the EAW FD means that, in the event of a refusal to execute the EAW, the judicial authorities of the executing Member States are themselves required to ensure that the sentence pronounced against that person is actually executed (para 43).
- **Article 4(6) does not authorise a Member State to refuse to execute an EAW issued with a view to the surrender of a person who has been judged and given a custodial sentence on the sole ground that that Member State intends to prosecute that person in relation to the same acts** (para 48):
  - Article 4(6) makes no mention whatsoever of a possibility for the executing authority to refuse to execute an EAW in the event that a fresh prosecution for the same acts may be brought against that person on its territory (para 45);
  - such an interpretation would be inconsistent with Article 50 Charter (para 46).



### Case C-514/17, *Sut*, Judgment of 13 December 2018.

- **Facts.** In 2011, a Romanian court issued an EAW against Sut, a Romanian citizen, for the execution of a custodial sentence of 1 year and 2 months. In 2015, Sut moved to Belgium, where he lived and worked with his spouse on a self-employment basis. In 2017, when the Belgian court ordered the execution of the EAW, Sut brought an appeal against such order. Sut was residing in Belgium and he had economic and family ties there. However, the Belgian court was hesitant about refusing the EAW on the basis of Article 6(4) of the Belgian Law on the EAW, which transposes Article 4(6) EAW FD. The offences for which the Romanian court imposed a custodial sentence are punishable in Belgium by fines only. Moreover, although Belgian Law provides for the possibility of adapting a sentence if its length or nature is incompatible with Belgian law, it expressly prohibits the conversion of a custodial sentence into a fine.
- **Main question.** Can Article 4(6) EAW FD be interpreted as being inapplicable to acts for which a custodial sentence has been imposed by a court of an issuing Member State when those same acts are punishable in the territory of the executing Member State only by a fine, which means, in accordance with the domestic law of the executing Member State, that the custodial sentence cannot be executed in the executing Member State, which would be to the detriment of the social rehabilitation of the person sentenced and of the person's family, social, economic and other ties?
- **CJEU's reply.** **Article 4(6) EAW FD must be interpreted as meaning that, where, as in the case in the main proceedings, a person who is the subject of an EAW issued for the purposes of enforcing a custodial sentence resides in the executing Member State and has family, social and working ties in that Member State, the executing judicial authority may, for reasons related to the social rehabilitation of that person, refuse to execute that warrant, despite the fact that the offence which provides the basis for that warrant is, under that national law of the executing Member State, punishable by fine only, provided that, in accordance with its national law, that fact does not prevent the custodial sentence imposed on the person requested from actually being enforced in that Member State, which is for the referring court to ascertain.** The CJEU's main arguments follow.
  - **The application of Article 4(6) EAW FD requires the following.**
    - The requested person is a national or a resident, or has to be 'staying' in the executing Member State (para 34, with reference to *Kozłowski*).
    - The executing Member State has to undertake to enforce the sentence or detention order in accordance with its domestic law. If the executing Member State finds that it is in fact impossible to undertake to enforce the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State (para 35, with reference to *Popławski I*).
    - There is a legitimate interest, for reasons related to the social reintegration of that person, that would justify the sentence being enforced on the territory of the executing Member State (para 36, with reference to *Kozłowski*).
  - **It is for the executing judicial authority to satisfy itself that its law allows the custodial sentence imposed in the issuing Member State on the requested person actually to be enforced** (para 49):
    - Article 4(6) EAW FD does not give any indication from which the second condition stated in that provision could be interpreted as automatically precluding a judicial authority of the executing Member State from refusing to execute an EAW where the law of that Member State provides only for a fine in response to the offence to which the warrant relates (para 41);
    - when transposing Article 4 EAW FD into domestic law, the Member States have, of necessity, a certain margin of discretion (para 42);
    - a risk of the requested person going unpunished must be avoided (para 47);

- no provision of Framework Decision 2008/909 (FD 2008/909) can affect the scope of the ground for optional non-execution of Article 4(6) EAW FD or the way in which it is applied (para 48).

### Case C-573/17, *Popławski*, Judgment of 24 June 2019 (*Popławski II*).

- **Facts.** In 2007, a Polish court imposed on Popławski, a Polish national, a 1-year suspended prison sentence. In 2010, the Polish court ordered the enforcement of that custodial sentence. In 2013, an EAW was issued with a view to enforcement of that sentence. By that time, Popławski had become a 'resident' in the Netherlands within the meaning of Article 4(6) EAW FD, transposed in Dutch law in Article 6 of the Dutch Surrender of Persons Act. The CJEU's first *Popławski* judgment (Case C-579/15, *Popławski I*, see *supra*) concerned the legal effect and interpretation of Article 4(6) EAW FD. In *Popławski I*, the CJEU underlined, inter alia, that the national court is obliged to interpret the provisions of national law, so far as possible, in the light of the wording and purpose of the EAW FD. According to the referring court, it follows from *Popławski I* that EU law does not preclude an interpretation of Article 6(3) of the Dutch Surrender of Persons Act that would make it possible to ensure that the custodial sentence is actually enforced in the Netherlands. However, because the Minister of Security and Justice in the Netherlands did not agree with this interpretation, the referring court concluded that it could not ensure that the sentence will actually be enforced in the Netherlands. The referring court wondered whether it could perhaps disapply the provisions of Dutch law that are incompatible with the FD EAW and go ahead with the surrender to Poland. In addition, the referring court explained that Article 6(3) of the Dutch Surrender Act was amended by the Dutch Law on the mutual recognition and enforcement of custodial and suspended sentences (hereinafter WETS), which implemented FD 2008/909. The WETS came into force in July 2012 and changed the wording of Article 6(3) of the Dutch Surrender Act. By no longer requiring a legal basis in a convention for the actual enforcement of a sentence in the Netherlands, the new provision is fully in line with the EU legal framework. However, to the referring court it is not clear whether the WETS should apply to the case at hand. On the one hand, the transitional regime of the WETS, adopted pursuant to Article 28(2) FD 2008/909, clearly states that it shall not apply to judicial decisions that became final before 5 December 2011 (as occurred in the present case). On the other hand, the Netherlands made its declaration only **after** FD 2008/909 was adopted, which is not in line with the wording of Article 28(2) FD 2008/909. Therefore, the validity of the transitional provision could be questioned.
- **Main questions.** Does the principle of primacy of EU law impose an obligation on a Member State to disapply a provision of the law of that Member State that is incompatible with the provisions of a framework decision? Is a declaration made by a Member State pursuant to Article 28(2) FD 2008/909 **after** the framework decision was adopted capable of producing legal effects?
- **CJEU's reply.** **Article 28(2) FD 2008/909 must be interpreted as meaning that a declaration made pursuant to that provision by a Member State after that framework decision was adopted is not capable of producing legal effects. The principle of the primacy of EU law does not require a national court to disapply a provision of national law that is incompatible with the provisions of a framework decision. The authorities of the Member States are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned.** The CJEU's main arguments follow.
  - **A declaration made pursuant to Article 28(2) FD 2008/909 by a Member State after that framework decision was adopted is not capable of producing legal effect.**

- Article 28(2) FD 2008/909 derogates from the general arrangements laid down in Article 28(1); therefore, it requires strict interpretation (para 45).
- The wording of Article 28(2) is quite clear: ‘any Member State may, on the adoption of this Framework Decision, make a declaration’. Consequently, a declaration made after that date does not satisfy these conditions and therefore does not produce legal effects (para 46).
- The general scheme of FD 2008/909 also confirms this interpretation; whenever a declaration is allowed to be made after the adoption date, such a power is expressly laid down in the relevant provision (e.g. Articles 4(7), 7(4) FD 2008/909) (para 47).
- The mere fact that a Member State expresses its intention to make a declaration according to Article 28(2) is not sufficient to be regarded as a declaration pursuant to Article 28(2) (para 48).
- **The principle of primacy of EU law does not require a national court to disapply a provision of national law that is contrary to the provisions of a framework decision:**
  - a national court’s obligation to disapply a provision of its national law that is contrary to a provision of EU law is dependent on the direct effect of that provision in the dispute pending before that court (para 68);
  - framework decisions do not have direct effect; they are binding on the Member States only as to the result to be achieved and leave to the national authorities the choice of form and methods (Article 34(2)(b) of the former TEU; para 69, with reference to *Ognyanov* and *Popławski I*);
  - because the EAW FD and FD 2008/909 have not been subject to any repeal, annulment or amendment, they continue to have the legal effect attributed to them under Article 34(2)(b) of the former TEU because the legal effects of any framework decision are preserved in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties (para 70, with reference to *Ognyanov*).
- **The authorities of the Member States are required to interpret their national law, to the greatest extent possible, in conformity with EU law to ensure an outcome that is compatible with the objective pursued by the framework decisions concerned.**
  - The whole body of domestic law has to be taken into consideration and the interpretative methods recognised by domestic law have to be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it (para 77, with reference to *Lopes Da Silva Jorge*, *Popławski I* and *TC*).
  - A national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law or is applied in such a manner by the relevant national authorities (para 79, with reference to *Ognyanov*).
  - The interpretation of the national provision is up to the national court alone; however, the CJEU may provide some guidance and indicate to the national court which interpretation of national law would fulfil its obligation to interpret that law in conformity with EU law (para 87, with reference to *Klohn*).
  - In *Popławski I* (paras 41 and 42), the CJEU already held that the EAW FD could be placed on the same footing as a ‘convention’ as mentioned in Article 6(3) of the Dutch Surrender of Persons Act (in the version applicable until the entry into force of the WETS). This interpretation ensures the conformity of the national

- law in question with the EAW FD (paras 91 and 92, with reference to paras 39 and 42 of *Popławski I*) and was also endorsed by the referring court, in accordance with methods of construction recognised by Dutch law (para 98).
- The decision on the execution of the EAW made against Popławski cannot depend on the minister's interpretation of Article 6(3) of the Dutch Surrender of Persons Act, as the minister is not a judicial authority for the purpose of the FD EAW (paras 95–98).
  - If the national court can interpret Article 6 (3) of the Dutch Surrender of Persons Act (in the version applicable until the entry into force of the WETS) in an EU-conforming way, in accordance with the methods of construction recognised by Dutch law, it is required to apply that interpretation without having regard to the fact that the minister is opposed to that interpretation (para 98).
  - The referring court should also consider that Article 4(6) FD EAW may be exercised only if the executing authority, after having ascertained, first, that the person is staying in, or is a national or a resident of, the executing Member State, and, second, that the custodial sentence passed in the issuing Member State against that person can actually be enforced in the executing Member State, considers that there is a legitimate interest that would justify the sentence imposed in the issuing Member State being enforced in the executing Member State (paras 100 and 101, with reference to *Sut*).
  - The referring court should also seek for an interpretation that is not contrary to the objective of the FD EAW, bearing in mind that the purpose of Article 4(6) EAW FD is to avoid any risk of impunity of the requested person (paras 102–106).
  - If Dutch law is interpreted in such a way that the refusal to execute the EAW issued by Poland is subject to the guarantee that the custodial sentence that Popławski received will actually be enforced in the Netherlands, this will be in conformity with the objectives of FD EAW (para 107). According to the CJEU such an interpretation seems possible, but it is for the referring court to verify this (para 108).

### 7.3. *Ne bis in idem*

In relation to the principle of *ne bis in idem*<sup>4</sup>, the CJEU has clarified that the term 'same acts' is an autonomous concept of EU law and that this term has the same meaning in the context of Article 54 of the Convention Implementing the Schengen Agreement (CISA) and in Article 3(2) EAW FD. The CJEU confirmed that the question whether a case has been 'finally judged' must be determined by the law of the Member State in which judgment was delivered (*Mantello*). The CJEU also held that Articles 3(2) and 4(3) EAW FD cannot be relied on for the purpose of refusing to execute an EAW in cases where a public prosecutor's office terminated an investigation opened against an unknown person during which the person who is the subject of the EAW was interviewed as a witness only (*AY*).

<sup>4</sup> For an overview of the case-law of the CJEU on Article 54 of the Convention Implementing the Schengen Agreement (CISA), see Eurojust note on *The principle of ne bis in idem in criminal matters in the case-law of the court of justice of the European Union*, which can be found at Eurojust's website [here](#).

### Case C-261/09, *Mantello*, 16 November 2010.

- **Facts.** A German court received an EAW from an Italian court for the surrender of Mantello, an Italian national, in the context of a prosecution brought against him for drug-related offences and participation in a criminal organisation. The German court considered whether it should refuse to execute the EAW on the basis of Article 3(2) EAW FD, particularly in view of the following circumstances. Mantello had been convicted in Italy for possession of cocaine intended for resale while, at the time of the investigation which led to Mantello's conviction, the investigators already had sufficient evidence to charge and prosecute him in connection with the criminal charges set out in the EAW. However, for tactical reasons, such as breaking up the trafficking network and arresting other persons involved, the investigators had refrained from providing the relevant information and evidence to the investigating judge. The German judge wondered whether this was a case of *ne bis in idem*, in particular because, under German law, as interpreted by the German Federal Court, a subsequent prosecution for participation in a criminal organisation would be allowed only if the investigators were unaware of this offence at the time of the first conviction, which was not the case.
- **Main questions.** Is the existence of 'same acts' of Article 3(2) EAW FD to be determined according to the law of the issuing Member State, according to the law of the executing Member State or according to an autonomous interpretation of EU law? May the executing authority in circumstances such as those in the main proceedings refuse to execute an EAW on the basis of Article 3(2) EAW FD?
- **The CJEU's reply.** **The concept of 'same acts' in Article 3(2) EAW FD constitutes an autonomous concept of EU law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) EAW FD made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) EAW FD, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) EAW FD.** The CJEU's main arguments follow.
  - **'Same acts' is an autonomous concept of EU law.** The interpretation of 'same acts' cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law. It follows from the need for uniform application of EU law that, because that provision makes no reference to the law of the Member States with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the EU (para 38).
  - **'Same acts' has the same meaning in CISA and EAW FD.** The concept 'same acts' is also present in Article 54 CISA and in that context it has been interpreted as referring to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In the light of the shared objective of Article 54 CISA and Article 3(2) EAW FD, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, the interpretation given in the rulings concerning the CISA must be equally applied to the provision of the EAW FD (paras 39 and 40).
  - **The present case relates more to the concept of 'finally judged'** (para 43).
  - **Whether a case has been 'finally judged' must be determined by the law of the Member State in which judgment was delivered.** The CJEU refers to its *Turanský* judgment on the interpretation of Article 54 CISA and concludes that whether a person has been 'finally' judged for the purposes of Article 3(2) EAW FD is to be determined by

the law of the Member State in which judgment was delivered (para 46). Because, in the case at stake, the Italian authorities had clearly stated that the facts on which the EAW was based had not been an object of the trial, the German authorities were bound to draw the appropriate conclusions from that assessment and had no reason to apply Article 3(2) EAW FD (paras 49 and 50).

### Case C-268/17, AY, Judgment of 25 July 2018.

- See also *supra* 2 (on admissibility).
- **Facts.** See *supra* 2.
- **Main question.** Must Articles 3(2) and 4(3) EAW FD be interpreted as meaning that a decision of a public prosecutor's office which terminated an investigation opened against an unknown person, during which the person who is the subject of the EAW was interviewed as a witness only, may be relied on for the purpose of refusing to execute that EAW?
- **CJEU's reply.** Neither Article 3(2) EAW FD nor Article 4(3) EAW FD can be relied on in the present case. The CJEU's main arguments follow.
  - **Article 3(2) EAW FD (mandatory ground for non-recognition) cannot be relied on in the present case:**
    - this provision reflects the *ne bis in idem* principle, enshrined in Article 50 Charter (para 39);
    - this provision requires that the requested person has been 'finally judged' (para 40), which implies that criminal proceedings had previously been instituted against the requested person (para 43, with reference to *Mantello*);
    - the principle does not extend to persons who were merely interviewed in the course of a criminal investigation, such as witnesses (para 44);
    - because no criminal proceedings were brought against AY, he cannot have been considered to have been finally judged within the meaning of Article 3(2) EAW FD (para 45).
  - **Article 4(3) EAW FD (including three optional grounds for non-recognition) cannot be relied on in the present case:**
    - the first ground, 'the executing judicial authority may refuse to execute the EAW where the judicial authorities of the executing Member State have decided not to prosecute for the offence on which the EAW is based', is not applicable as the Hungarian decision does not concern the discontinuance of criminal proceedings (paras 48 and 49);
    - the second ground, 'the executing judicial authority may refuse to execute the EAW where, in the executing Member State, the judicial authorities have decided to halt proceedings in respect of the offence on which the EAW is based', is not applicable as the Hungarian decision which halted the proceedings was not taken in respect of the requested person (paras 50–60);
    - the third ground, 'the executing judicial authority may refuse to execute the EAW where a final judgment has been passed on the requested person in a Member State, in respect of the same acts, which prevents further proceedings', is not applicable as the conditions for its application are not fulfilled (paras 61 and 62).

## 7.4. *In absentia* judgments

In the context of *in absentia* judgments, the CJEU has clarified, first of all, that an executing judicial authority may make the surrender of a person subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD (*IB*). The CJEU also interpreted Article 4a(1) EAW FD, explaining that this provision has harmonised – in an exhaustive way – the circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence. This means that executing judicial authorities cannot impose any additional requirements based on national law (*Melloni*). It also means that the executing authority cannot refuse the execution of the EAW on the mere ground that the issuing authority does not provide the guarantee of a right to a new trial within the meaning of Articles 8 and 9 of Directive 2016/343/EU, where the requested person prevented his summons in person and did not appear in person at the trial due to his flight to the executing Member State (*Generalstaatsanwaltschaft Hamburg*). The CJEU ruled that the terms ‘summoned in person’ and ‘actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial’ of Article 4a(1)(a)(i) EAW FD constitute autonomous concepts of EU law that need to be interpreted uniformly throughout the EU (*Dworzecki*). The CJEU further explained how the term ‘trial resulting in the decision’ set out in Article 4a(1) EAW FD should be interpreted. It ruled that this term relates only to the proceedings that led to the decision which finally determined the guilt of the person concerned and imposes a penalty on them (*Tupikas; Zdziaszek; Ardic*).

### Case C-306/09, *IB*, Judgment of 21 October 2010.

- See *infra* 8 (on guarantees).

### Case C-399/11, *Melloni*, Judgment of 26 February 2013.

- **Facts.** See *supra* 6 (on human rights scrutiny).
- **Main question.** Must Article 4a(1) EAW FD be interpreted as precluding the executing judicial authority from making the execution of an EAW conditional on the conviction rendered *in absentia* being open to review in the issuing Member State?
- **The CJEU’s reply.** Article 4a(1) EAW FD does not allow that an executing judicial authority makes the execution of an EAW conditional on the conviction rendered *in absentia* being open to review in the issuing Member State. The CJEU’s main arguments follow.
  - **The purpose of the EAW FD.** As is apparent in particular from Article 1(1) and (2) EAW FD and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a simplified and more effective system of surrender based on the principle of mutual recognition (paras 36 and 37, with reference to *Radu*).
  - **The exhaustive nature of the list of grounds for non-recognition.** Under Article 1(2) EAW FD, the Member States are in principle obliged to act on an EAW. They may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 EAW FD and in the cases of optional non-execution listed in Articles 4 and 4a EAW FD (para 38, with reference to *Radu*).
  - **The wording, scheme and purpose of Article 4a(1).** Article 4a(1) EAW FD provides for an optional ground for non-execution of an EAW where the person concerned was convicted *in absentia*. That option is nevertheless accompanied by four exceptions in which the executing judicial authority may not refuse to execute the EAW (paras 39–42).

- **The objective of FD 2009/299.** The EU intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonisation of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person (para 43).
- **The exhaustive nature of the list of circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence** (para 44).

### Case C-108/16 PPU, *Dworzecki*, Judgment of 24 May 2016.

- **Facts.** Polish judicial authorities issued an EAW for the surrender of Dworzecki, a Polish national, for the purpose of executing in Poland three custodial sentences of 2 years, 8 months and 6 months, respectively. The request for a preliminary ruling concerned surrender for the purpose of executing only the second custodial sentence. As regards that sentence, point D of the EAW stated that Dworzecki had not appeared in person at the trial leading to the judgment in which the sentence was imposed. The Polish judicial authority acknowledged in the EAW form that the person was not summoned in person, but the summons was sent to the address which Dworzecki had indicated for service of process and it was received by Dworzecki's grandfather, who had undertaken to pass the process on to the addressee. Against this background, the Dutch executing judicial authority had some questions about the interpretation of Article 4a(1)(a)(i) EAW FD.
- **Main questions.** Are the terms of Article 4a(1)(a)(i) EAW FD 'summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision' and 'by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' autonomous concepts of EU law? Does a summons, such as that at issue in the main proceedings, satisfy the conditions laid down in that provision?
- **The CJEU's reply.** **Both terms are autonomous concepts of EU law. A summons which was not served directly on the person concerned, but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the EAW whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in Article 4a(1)(a)(i) EAW FD.** The CJEU's main arguments follow:
  - The terms 'summoned in person' and 'actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' of Article 4a(1)(a)(i) EAW FD constitute autonomous concepts of EU law and thus need to be interpreted in the same way in the whole EU (para 32).
  - A summons that was not directly handed over to the person concerned but sent to the person's address and given to an adult resident of the person's household who undertook to pass it on to the latter is not enough in itself to satisfy the condition set out in Article 4a(1)(a)(i) EAW FD (para 54).
  - Duties and options for issuing and executing authorities under Article 4a(1)(a)(i) EAW FD:
    - the issuing judicial authority is required to indicate in the EAW the evidence on the basis of which it found that the person concerned actually received official information of the scheduled date and place of the trial (para 49);
    - the executing judicial authority, when assessing whether the conditions of Article 4a(1)(a)(i) EAW FD are fulfilled, can not only rely on the EAW but also take into account other circumstances (para 50), including:
      - specific circumstances of which the executing judicial authority became aware when hearing the person concerned (para 49);



- a possible lack of diligence in the conduct of the concerned person, e.g. if the person tried to avoid service of the summons addressed to them (para 51);
  - specific provisions of national law of the issuing Member State such as the provision of the Polish criminal procedure, which grants the person a right to request a retrial under certain conditions (para 52).
- The executing judicial authority can always request, as a matter of urgency, additional information on the basis of Article 15(2) EAW FD if it finds that the information provided by the issuing judicial authority is insufficient (para 53).

### Case C-270/17, *Tupikas*, Judgment of 10 August 2017.

- **Facts.** In 2017, a Lithuanian court issued an EAW for Tupikas in relation to the execution of a sentence of 1 year and 4 months. Although it was a proven fact that Tupikas had appeared in person at the trial at first instance, the EAW did not contain any information concerning his presence in the appeal proceedings. The referring Dutch court wondered whether the mere fact that the person concerned was able to exercise his right of defence at first instance is sufficient for it to conclude that the requirements laid down in Article 6 ECHR (right to a fair trial) and Article 47 Charter (right to an effective remedy and to a fair trial) had been met. Therefore, the Dutch court decided to stay the proceedings and to refer a question to the CJEU.
- **Main question.** Does the term ‘trial resulting in the decision’ within the meaning of Article 4a(1) EAW FD, refer only to proceedings at first instance or, to the contrary, also to appeal proceedings?
- **The CJEU’s reply.** Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down *in absentia*, the concept of ‘trial resulting in the decision’ within the meaning of Article 4a(1) 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 them, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. An appeal proceeding such as that at issue in the main proceedings in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above. The CJEU’s main arguments follow.
- **The concept of ‘trial resulting in the decision’ of Article 4a(1) EAW FD:**
    - the concept of ‘trial resulting in the decision’ constitutes an autonomous concept of EU law and thus needs to be interpreted uniformly throughout the EU (paras 65–68);
    - where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down *in absentia*, the concept of ‘trial resulting in the decision’ 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 them, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case (paras 70–90 and 98);
    - an appeal proceeding such as that at issue in the main proceedings in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above (para 99).
  - **The application of Article 4a(1) EAW FD:**

- when the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, Article 4a(1) did not apply (para 86);
- conversely, when the person concerned was present at the first instance, i.e. not at the proceedings concerned with a fresh assessment of the merits of the case, Article 4a(1) applied and the executing judicial authority was required to carry out the checks provided in that article (paras 86 and 93).
- **The assessment to be made by the executing judicial authority:**
  - in a case such as that in the main proceedings the issuing judicial authority must provide the information referred to in Article 8(1) EAW FD and the executing judicial authority is empowered, in accordance with Article 15(2) EAW FD, to request additional information which it considers necessary to enable it to make a decision on the surrender (para 91);
  - if the executing judicial authority finds that the situation before it corresponds to one of those described in Article 4a(1)(a) to (d), it is required to execute the EAW and to authorise the surrender of the person sought (para 95);
  - Article 4a EAW FD provides for an optional ground for non-execution of the EAW and the cases referred to in Article 4a(1)(a) to (d) were conceived as exceptions to that optional ground for non-recognition (para 96);
  - if the executing judicial authority finds that the situation before it does not correspond to one of those described in Article 4a(1)(a) to (d), it can take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of their rights of defence (para 96, with reference to *Dworzecki*);
  - thus, the EAW FD does not prevent the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain, provided that compliance with the deadlines laid down in Article 17 EAW FD is not called into question (para 97).

### Case C-271/17, *Zdziaszek*, Judgment of 10 August 2017.

- **Facts.** In 2014, a Polish court issued an EAW against *Zdziaszek*, a Polish national, residing in the Netherlands, for the execution of two custodial sentences in Poland. Point (d) of the EAW indicated that *Zdziaszek* did not appear in person during the proceedings which led to the judicial decision which finally determined the sentence that he would have to serve. On the basis of the information provided by the issuing authority, the referring court took the view that the situation referred to in Article 4a(1)(b) EAW FD did not apply in the case because it was not apparent from that information that the person sought '[was] aware of the scheduled trial' or that he 'had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him ... at the trial'. The Dutch court decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling.
- **Main questions.** Must the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD be interpreted as referring to the appeal proceedings and/or to proceedings for the amendment of custodial sentences handed down previously, such as those which led to the judgment handing down a cumulative sentence at issue in the main proceedings? Is an executing judicial authority allowed to refuse to execute the EAW for the sole reason that neither the standard form of the EAW nor the additional information obtained from the issuing judicial authority pursuant to Article 15(2) EAW FD provide sufficient information to enable it to establish that one of the situations referred to in Article 4a(1)(a) to (d) EAW FD exists?

- **The CJUE's reply.** The concept of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard. The EAW FD must be interpreted as meaning that, where the person concerned has not appeared in person in the relevant proceedings and where neither the information contained in the standard EAW form nor the information obtained pursuant to Article 15(2) EAW FD provide sufficient evidence to establish the existence of one of the situations referred to in Article 4a(1)(a) to (d) EAW FD, the executing judicial authority may refuse to execute the EAW. However, the EAW FD does not prevent that authority from taking account of all the circumstances characterising the case brought before it to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding. The CJEU's main arguments follow.
- **The concept of 'trial resulting in the decision' of Article 4a(1) EAW FD:**
    - the concept must be interpreted as covering the appeal proceedings that led to the decision which, after a new examination of the merits of the case in fact and in law, finally determined the guilt of the person concerned and imposed a penalty on them, such as a custodial sentence, even though the sentence handed down was amended by a subsequent decision (paras 76–82, with reference to *Tupikas*);
    - the concept must be interpreted as also covering subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard (para 96, with reference to relevant case-law from the ECtHR in paras 87–89);
    - in a case such as that at issue in the main proceedings, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on them, the level of which was, however, amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of Article 4a(1) EAW FD (para 93).
  - **The assessment to be made by the executing judicial authority:**
    - in a case such as that in the main proceedings, the issuing judicial authority must provide the information referred to in Article 8(1) EAW FD in relation to the appeal proceedings and the subsequent proceedings (paras 97–99);
    - the executing judicial authority is entitled to refuse to execute an EAW issued for the purpose of executing a custodial sentence or a detention order if the person concerned did not appear in person at the trial resulting in the decision, unless the EAW indicates that the conditions set out in subparagraphs (a), (b), (c) or (d) of that provision are met (para 101);
    - if the executing judicial authority finds that the situation before it corresponds to one of those described in Article 4a(1)(a) to (d), the executing judicial authority is required to execute the EAW and to authorise the surrender of the person sought (para 102);

- if the executing judicial authority takes the view that it does not have sufficient information to enable it to validly decide on the surrender of the person concerned, it is incumbent on it to apply Article 15(2) EAW FD by requesting from the issuing judicial authority the urgent provision of such additional information (para 103);
- the executing judicial authority must ensure that the time limits laid down in Article 17 EAW FD are complied with, with the result that it cannot be required to resort to that Article 15(2) EAW FD again (para 105, with reference to *Aranyosi and Căldăraru*);
- if it has not obtained the necessary assurances as regards the rights of defence of the person concerned during the relevant proceedings, the executing judicial authority may refuse to execute the EAW (para 104);
- Article 4a EAW FD provides for an optional ground for non-execution of the EAW and the cases referred to in Article 4a(1)(a) to (d) were conceived as exceptions to that optional ground for non-recognition (para 106, with reference to *Tupikas*);
- the executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the EAW, take account of other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of their rights of defence (para 107, with reference to *Dworzecki*);
- thus, the EAW FD does not prevent the executing judicial authority from ensuring that the rights of defence of the person concerned are respected by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain (para 108).

### Case C-571/17, *Ardic*, Judgment of 22 December 2017.

- **Facts.** In 2009 and 2010, two German courts imposed on Ardic, a German national, two custodial sentences, each for a period of 1 year and 8 months, following trials at which he had appeared in person. After serving a portion of those two sentences, the competent courts granted a suspension of the execution of the remainder of those sentences. However, in 2013, one of the courts revoked those suspensions and ordered the execution of the remainder of those sentences on the ground that Ardic had persisted in infringing the prescribed conditions and evading the supervision and guidance of his probation officer and the supervision of the courts. Ardic did not appear at the proceedings which resulted in the revocation decisions. In 2017, an application for the execution of a German EAW was made before a Dutch court as Ardic had in the meantime moved to the Netherlands.
- **Main question.** If the requested person has been found guilty in final proceedings conducted in the requested person's presence and has had imposed on them a custodial sentence, the execution of which has been suspended subject to certain conditions, do subsequent proceedings, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of non-compliance with conditions and evasion of the supervision and guidance of a probation officer, constitute a 'trial resulting in the decision' as referred to in Article 4a EAW FD?
- **The CJEU's reply.** Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision' must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the

**probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.** The CJEU's main arguments follow.

- Except in exceptional circumstances, the executing judicial authorities may refuse to execute an EAW only in the exhaustively listed cases of non-execution provided for by the EAW FD, and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein (para 70, with reference to *Tupikas*).
- Article 4a(1) EAW FD must be interpreted as meaning that the concept of 'decision' referred to therein relates to the judicial decision or decisions concerning the criminal conviction of the person concerned. Thus, it must be determined whether a decision to revoke suspension of execution of a custodial sentence previously imposed is of such a nature that it can be equated to such 'decision' (paras 67 and 68).
- Whereas the final judicial decision convicting the person concerned, including the decision determining the custodial sentence to be served, falls fully within Article 6 ECHR, it is apparent from the case-law of the ECtHR that that provision does not apply to questions relating to the detailed rules for the execution or application of such a custodial sentence. The position is different only where, following a finding of guilt of the person concerned and having imposed a custodial sentence on them, a new judicial decision modifies either the nature or the quantum of sentence previously imposed (paras 75 and 76).
- The decision to revoke the suspension of the execution of previously imposed custodial sentences did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned. The proceedings leading to those revocation decisions were not intended to review the merits of the cases but only concerned the consequences, i.e. the fact that the convicted person had not complied with those conditions during the probationary period (paras 78 and 79).
- The only effect of suspension revocation decisions is that the person concerned must at most serve the remainder of the sentence initially imposed (para 81).
- Even where a convicted person has been the subject of a suspension revocation decision adopted following proceedings in which the convicted person has not appeared, that person is not deprived of all rights insofar as they have the right to be heard a posteriori by the judge and inasmuch as that judge is required to determine whether, in the light of the hearing, the suspension revocation decision must be amended (para 85).

### Case C-416/20 PPU, *Generalstaatsanwaltschaft Hamburg*, Judgment of 17 December 2020

- **Facts.** The German authorities arrested TR in execution of two Romanian EAWs issued for the execution of two different custodial sentences, both rendered *in absentia*. In the criminal proceedings against him in Romania, TR was not summoned in person because he was not found at his last known address. TR did not appear in person at trial but he was nevertheless aware of the proceedings against him, and at first instance – in each of the two cases – he mandated a lawyer of his choosing and was defended by his chosen counsel. At appeal stage, TR was represented by a court-appointed lawyer. It also results that TR absconded in Germany to avoid the criminal proceedings against him in Romania. The Romanian issuing authorities refused to guarantee to the German executing authorities that TR would be entitled to a new trial since he was validly summoned according to Romanian law. The German authorities executed the EAWs and ordered his surrender to Romania, holding that even though he did not appear in person at his trials, he prevented his summons in person by fleeing to Germany and he was aware of the proceedings against him, in which he was defended by a lawyer of his choosing. TR challenged the lawfulness of the decision to execute the EAWs on the ground that the absence of a guarantee

to a new trial by the Romanian issuing authorities would be in violation of Articles 8 and 9 of Directive 2016/343.

- **Main question.** Does Article 4a EAW FD mean that the executing authority may refuse the execution of an EAW issued for the purpose of executing a custodial sentence where the person prevented his summons in person and did not appear in person at his trial due to his absconding in the executing Member State, based on the mere ground that the issuing authority did not offer the guarantee of his right to a new trial within the meaning of Articles 8 and 9 of Directive 2016/343?
- **CJEU's reply.** Article 4a EAW FD must be interpreted as meaning that the executing authority cannot refuse the execution of an EAW issued for the purpose of executing a custodial sentence where the requested person prevented his summons in person and did not appear in person at his trial due to his absconding in the executing Member State, based on the mere ground that the issuing authority did not offer the guarantee of his right to a new trial within the meaning of Articles 8 and 9 of Directive 2016/343. The CJEU's main arguments follow.
  - **Non-compliance with by the national law of the issuing Member State with the provisions of Directive 2016/343 cannot constitute a valid ground to refuse the execution of an EAW (para 46):**
    - Article 4a(1) of the EAW FD harmonises the conditions of execution of an EAW in the event of a conviction rendered *in absentia*. It restricts the possibility of refusing to execute the EAW by listing the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may not be refused (paras 36 and 37, with a reference to *Tupikas* and *Melloni*);
    - Article 4a(1) of the EAW FD does not infringe the right to effective judicial protection nor the rights of the defence, enshrined in Articles 47 and 48 of the Charter (para 42, with a reference to *Melloni*);
    - Articles 8 and 9 of Directive 2016/343 grant the right to be present at trial and the right to a new trial where the conditions allowing for a trial *in absentia* were not met. Yet, invoking the provisions of Directive 2016/343 to refuse the execution of an EAW would allow to circumvent the system of the EAW FD which lists in an exhaustive manner the grounds for non-execution. Furthermore Directive 2016/343 does not apply to EAW proceedings (paras 43–47);
    - The impossibility to invoke Directive 2016/343 to prevent the execution of an EAW does not affect the absolute obligation of the issuing Member State to comply, within its national legal order with EU law and the requested person, after his surrender, may invoke those provisions before the courts of the issuing Member State (paras 55 and 56);
  - **The assessment to be made by the executing judicial authority:**
    - The executing authority must first determine whether the trial at first instance or the appeal falls within the notion of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD and secondly assess whether the conditions laid down in such provisions are met in relation to each of those proceedings (paras 48–50, with a reference to *Tupikas*);
    - Since Article 4(a)(1) EAW FD contains an optional ground for non-execution, where the conditions under said provisions are not met, the executing authority may take into consideration other circumstances that allow him to ensure that the surrender of the requested person does not lead to a violation of his right of defence and order his surrender (para 51);
    - Within those other circumstances, the executing authority may take into account the behaviour of the requested person and the fact that he prevented his

summons in person or any contact from the court-appointed lawyers, or also that he appealed against the first instance decisions (paras 52 and 53);

- Where, to the contrary, the conditions under Article 4(a)(1) EAW FD are met, the executing authority cannot refuse the execution of the EAW.

## 7.5. Notification of a Member State's intention to withdraw from the EU

### Case C-327/18 PPU, RO, Judgment of 19 September 2018.

- **Facts.** In 2016, the competent authorities in the United Kingdom issued two EAWs in respect of RO for the purposes of conducting prosecutions of the offences of murder, arson and rape. RO was arrested in Ireland on the basis of these arrest warrants and has been held in custody since 3 February 2016. RO raised objections to his surrender by Ireland to the United Kingdom on the basis, among other things, of issues related to the United Kingdom's withdrawal from the EU. He argued that he is exposed to the risk that a number of the rights he enjoys under the Charter and Articles 26–28 EAW FD may no longer be respected after the withdrawal of the United Kingdom from the European Union.
- **Main question.** Must Article 50 TEU be interpreted as meaning that a consequence of the notification by a Member State of its intention to withdraw from the European Union in accordance with that article is that, in the event that that Member State issues an EAW with respect to an individual, the executing Member State must refuse to execute that EAW or postpone its execution pending clarification as to the law that will apply in the issuing Member State after its withdrawal from the European Union?
- **The CJEU's reply.** **Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union does not have that consequence. In the absence of substantial grounds to believe that the person who is the subject of that EAW is at risk of being deprived of rights recognised by the Charter, following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that EAW while the issuing Member State remains a member of the European Union.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the rule** (paras 36–38):
    - Article 1(1) and 1(2) EAW FD and recitals 5 and 7 indicate that the EAW FD constitutes a completely new regime based on mutual recognition and mutual trust;
    - an EAW must in principle be executed unconditionally, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Exceptions to the rule are allowed only in exceptional circumstances** (paras 39 and 40, with reference to *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the System of Justice)*).
  - **A mere notification by a Member State of its intention to withdraw from the European Union cannot be regarded as an 'exceptional circumstance'** (paras 44–48):
    - a notification given under Article 50 TEU does not have the effect of suspending the application of EU law in the Member State that has given the notification. EU law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union;
    - a refusal to execute an EAW would be the equivalent of unilateral suspension of the provisions of the EAW FD and would run counter to the wording of recital 10 of that EAW FD, which states that it is for the European Council to determine a

breach in the issuing Member State of the principles set out in Article 2 TEU with a view to an EAW being suspended.

- **The executing judicial authority must examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds to believe that, after withdrawal from the EU, the person is at risk of being deprived of their fundamental rights and the EAW FD related rights (paras 49–51).**
- **In the present case, the executing judicial authority is able to presume that, with respect to the person who is to be surrendered, the issuing Member State will apply the substantive content of the rights derived from the EAW FD that are applicable in the period subsequent to the surrender, after the withdrawal of that Member State from the European Union (paras 52–61):**
  - the United Kingdom is party to the ECHR and its continuing participation to that convention is not linked to its being a member of the EU;
  - the United Kingdom is party to the 1957 European Convention on Extradition and has incorporated in its national law other rights and obligations currently contained in the EAW FD.



## 8. Guarantees

The CJEU has repeatedly held that the execution of the EAW may be made subject only to the conditions exhaustively laid down in Article 5 EAW FD. The rulings summarised in the present chapter relate to the application of Article 5(3) EAW FD. This provision allows the executing authority to subject the execution of an EAW issued for the purposes of prosecution of a person who is a national or resident of the executing Member State to the guarantee that the requested person is returned to the executing Member State to serve there the custodial sentence or detention order passed against them in the issuing Member State. The CJEU holds that the return of the person concerned must take place as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence or to the proper administration of justice make the presence of the person essential in the issuing Member State until any procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW (e.g. confiscation) have been definitively closed (*SF*). Furthermore, the CJEU has ruled that where the execution of the EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909 (*SF*). Finally, the CJEU has clarified that an EAW for the execution of a sentence imposed *in absentia* may be subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD (*IB*).

### Case C-306/09, *IB*, Judgment of 21 October 2010.

- **Facts.** A Romanian court sentenced *IB*, a Romanian national, to 4 years' imprisonment for the offence of trafficking in nuclear and radioactive substances. The court ordered that the sentence, upheld on appeal, was to be served under a system of supervised release. Later, the Romanian Supreme Court upheld the sentence imposed on *IB* but ordered that it be served in custody. The decision of the Supreme Court was rendered *in absentia* and *IB* was not personally notified of the date or place of the hearing which led to the decision. *IB* fled to Belgium and the Romanian court of first instance issued an EAW for the arrest of *IB* with a view to executing the sentence of 4 years' imprisonment. The Belgian court was uncertain whether the EAW should be characterised as a warrant for the execution of a sentence or as a warrant for the purposes of prosecution. The decision as to which way to characterise it had important consequences: if it was a warrant for the execution of a sentence, *IB* could not apply to serve the sentence in Belgium for the situation does not concern the execution of a final judgment; by contrast, if it was a warrant for the purposes of prosecution, the Belgian authorities could make the surrender subject to the condition that *IB* should subsequently be returned to Belgium, his country of residence. The case was brought before the Belgian Constitutional Court, which made a reference to the CJEU for a preliminary ruling.
- **Main question.** Must Articles 4(6) and 5(3) EAW FD be interpreted as meaning that the execution of an EAW issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing Member State, as the case may be, to serve there the sentence passed against them following a new trial organised in the person's presence in the issuing Member State?
- **The CJEU's reply.** Articles 4(6) and 5(3) EAW FD must be interpreted as meaning that the execution of an EAW issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing Member State, as the case may be, to serve there the sentence

passed against them, following a new trial organised in the person's presence in the issuing Member State. An executing Member State may make the surrender of a person in a situation such as that of IB subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD. The CJEU's main arguments follow:

- Articles 3 to 5 EAW FD make it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State (para 51);
- Articles 4(6) and 5(3) EAW FD have the objective of increasing the requested person's chances of reintegrating into society (para 52);
- there is no indication in the EAW FD that persons requested on the basis of a sentence imposed *in absentia* should be excluded from that objective (para 53);
- the mere fact that Article 5(1) EAW FD makes the execution of an EAW issued following a decision rendered *in absentia* subject to a re-trial guarantee cannot have the effect of rendering inapplicable to that same EAW Articles 4(6) and/or 5(3) EAW FD (para 55);
- the situation of a person who was sentenced *in absentia* and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of an EAW for the purpose of **prosecution** and Article 5(3) EAW FD can therefore apply thereto (para 57);
- that interpretation avoids putting the person in a situation where they would waive their right to a retrial in the issuing Member State to ensure that their sentence may be executed in the Member State where they are resident pursuant to Article 4(6) EAW FD (para 59).

#### Case C-314/18, SF, Judgment of 11 March 2020.

- **Facts.** On 3 March 2017, the Canterbury Crown Court issued an EAW against SF, a Dutch national, in view of his prosecution for two offences of conspiracy to import drugs into the United Kingdom. The executing authority in the Netherlands requested the issuing authority to supply the guarantee under Article 5(3) EAW FD. The United Kingdom answered by undertaking to return SF to the Netherlands as soon as possible after the sentencing process had been completed and 'any other proceedings in respect of the offence for which extradition was sought are concluded', which would include the eventual proceedings for confiscation. Furthermore, the United Kingdom also noted that the transfer of SF did not allow the Netherlands to alter the duration of any sentence imposed by a United Kingdom court. The referring court in the Netherlands considered that such guarantee does not satisfy the conditions imposed by both the EAW FD and FD 2008/909. Therefore, it was of the opinion that surrender should be refused. However, the Netherlands harboured doubts as to the time at which the issuing Member State must implement the guarantee to return the person to the executing Member State. Furthermore, because its national legislation allows the foreign criminal sentence to be converted into a sentence normally applicable in the Netherlands, it also called into question whether, on the basis of Article 25 FD 2008/909, the executing Member State can adapt the custodial sentence or detention order imposed in the issuing Member State beyond what is allowed under Article 8(2) FD 2008/909. It therefore referred the case to the CJEU.
- **Main questions.** Must Article 5(3) EAW FD be interpreted as meaning that the executing Member State is under an obligation to return the surrendered person not only when the sentencing of the person concerned has become final but also when any other procedural step coming within the scope of the criminal proceedings relating to the offence underlying the EAW has been definitely closed? Must Article 25 FD 2008/909 be interpreted as meaning that, when the execution of an EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can, by way of derogation from Article 8(2) FD 2008/909, adapt the duration of

the sentence imposed in the issuing Member State to make it correspond to the sentence that would have been imposed for the offence in question in the executing Member State?

- **CJEU's reply. Article 5(3) EAW FD must be interpreted as meaning that the issuing Member State must return the person subject to the EAW as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence of the person concerned or to the proper administration of justice make the person's presence essential pending a definitive decision on any procedural step coming within the scope of the criminal proceedings relating to the offence underlying the EAW. Article 25 FD 2008/909 must be interpreted as meaning that, when the execution of an EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909. The CJEU's main arguments follow.**
- **The person must return as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence or the proper administration of justice require the person's presence.**
    - Article 5(3) EAW is silent on this issue. Article 5(3) EAW FD merely provides that the return of the person concerned is to take place after the person concerned has been heard in the issuing Member State (paras 44 and 45).
    - The coordination between EAW FD and FD 2008/909 requires that the return of the person concerned to the executing Member State should occur as soon as possible after the sentencing decision has become final (para 54):
      - Article 5(3) EAW and Article 3(1) of FD 2008/909 seek to facilitate the social rehabilitation of the person concerned (paras 47–51);
      - pursuant to its Articles 3(3) and 1(a), FD 2008/909 is applicable only to final judgments (paras 52 and 53);
      - pursuant to Article 3(3) FD 2008/909, the fact that, in addition to the sentence, a fine or confiscation order has been imposed, which has not yet been paid, recovered or enforced, is not to prevent the sentence from being forwarded to the executing Member State (para 55).
    - **The objective of facilitating the social rehabilitation of the person concerned must be balanced against both the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence and the safeguarding of the procedural rights of the person concerned (para 56):**
      - under Article 1(3) EAW FD and Article 3(4) FD 2008/909, those framework decisions cannot have the effect of modifying the obligation to respect fundamental rights and principles under EU law (paras 57 and 58);
      - the judicial authority of the issuing Member State may assess whether concrete grounds relating to the safeguarding of the rights of the defence or to the proper administration of justice make the presence of the person concerned essential in the issuing Member State after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW (para 59);
      - it is not open to the judicial authority of the issuing Member State systematically and automatically to postpone the return of the person concerned to the executing Member State until the other procedural

- steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW have been definitively closed (para 60);
- in the balancing exercise, the judicial authority of the issuing Member State must take into account the possibility of applying cooperation and mutual assistance mechanisms provided for in the criminal field under EU law (para 61).
- **The executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909:**
- Article 8(2) FD 2008/909 lays down strict conditions governing the adaptation by the executing Member State of the sentence imposed by the issuing Member State, which are the sole exceptions to the obligation to recognise the judgment and to enforce the sentence (paras 64 and 65);
  - the interpretation that Article 25 FD 2008/909 allows exceptions to those limits where an EAW is subject to the condition under Article 5(3) EAW FD would render entirely ineffective the principle of mutual recognition (para 66);
  - the executing Member State cannot refuse to surrender the person concerned where the issuing Member State makes a reservation with regard to the possibility that the sentence is not adapted beyond the situations contemplated in Article 8(2) FD 2008/909 (para 67).



## 9. Time limits

In several judgments, the CJEU underlined that Member States are, in principle, required to comply with the time limits for adopting decisions relating to an EAW (e.g. *Aranyosi and Căldăraru*, see *supra* 6; *Piotrowski*, see *supra* 7.1; *Tupikas* see *supra* 3). Member States are also required to comply with the time limits under Article 17 EAW FD where they provide for an appeal with suspensive effect against a decision by which the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State pursuant to Articles 27(4) and 28(3)(c) EAW FD (*Jeremy F*, see *infra* 10.4).

The CJEU held that a failure to observe the time limits of Article 17 EAW FD does not preclude the executing court from taking a decision on the execution of the EAW (*Lanigan*). The CJEU also clarified that, even after expiry of the time limits, the requested person can be kept in custody, subject to the limits of Article 6 Charter (*Lanigan; TC*).

The CJEU also noted that any suspension of the period for taking a final decision on the execution of the EAW is permissible only if the duty to provide information to the issuing judicial authority and/or Eurojust/Council, imposed on the executing judicial authority notably by Article 17(4) and (7) EAW FD, is complied with (*TC*).

The CJEU also clarified the time limits for surrender of the person mentioned in Article 23 EAW FD (*Vilkas*). The CJEU interpreted the ‘force majeure’ concept and underlined that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 EAW FD have expired.

### Case C-237/15 PPU, *Lanigan*, Judgment of 16 July 2015.

- **Facts.** An issuing judicial authority from the United Kingdom sent an EAW for the surrender of the requested person, Lanigan, to an Irish executing judicial authority. Criminal proceedings were brought against him in the United Kingdom for murder and possession of a firearm. Lanigan was detained in Ireland while he fought the execution of the EAW on different grounds. At one of the hearings, Lanigan submitted that the request for surrender should be rejected because the time limits stipulated in the EAW FD had not been complied with. The Irish court decided to stay the proceedings and referred the case to the CJEU.
- **Main questions.** Does a failure to observe the time limits stipulated in Article 17 EAW FD preclude the executing court from taking a decision on the execution of the EAW? And does it preclude that authority from keeping the person in custody where the total duration of the period that person has spent in custody exceeds those time limits?
- **The CJEU's reply.** **Articles 15(1) and 17 EAW FD must be interpreted as meaning that the executing judicial authority remains required to adopt the decision on the execution of the EAW after expiry of the time limits stipulated in Article 17. Article 12 EAW FD, read in conjunction with Article 17 EAW FD and in the light of Article 6 Charter, must be interpreted as not precluding, in such a situation, the holding of the requested person in custody, in accordance with the law of the executing Member State, even if the total duration for which that person has been held in custody exceeds those time limits, provided that that duration is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority is required to attach to the**

**provisional release of that person any measures it deems necessary so as to prevent the person from absconding and to ensure that the material conditions necessary for their effective surrender remain fulfilled for as long as no final decision on the execution of the EAW has been taken.** The CJEU's main arguments follow.

- **Even after expiry of the time limits, the executing authority must adopt a decision on the execution of the EAW:**
  - the wording, context and objective of Article 15(1) EAW FD (paras 35 and 36);
  - the central function of the obligation to execute the EAW and the absence of any explicit indication as to a limitation of the temporal validity of the obligation to execute the EAW in the EAW FD (paras 36 and 37);
  - Article 17(7) EAW FD shows that the EU legislature considered that in a situation in which time limits have not been observed the execution of the EAW is postponed, not abandoned (para 38);
  - Article 17(5) EAW FD includes obligations that makes sense only if the executing authority remains required to adopt the decision on the execution of the EAW after expiry of the time limits (para 39);
  - an opposite interpretation would run counter to the objective of the EAW FD because it could force the issuing authority to issue a second EAW or it could encourage delaying tactics aimed at obstructing the execution of EAWs (paras 40 and 41).
- **Even after expiry of the time limits, the requested person can, in principle, be kept in custody** (paras 43–52):
  - Article 12 EAW FD does not require that the requested person is released following the expiry of the time limits of Article 17 EAW FD (paras 43–46);
  - there is a clear difference in consequences with regard to the expiry of time limits between Article 23(5) EAW FD (the requested person 'shall be released') and Article 17(5) EAW FD (time limits 'may be extended');
  - if it is assumed that after the expiry of the time limits the executing authority must still adopt a decision on the execution of the EAW, a release of the requested person could limit the effectiveness of the surrender and obstruct the objectives pursued by the EAW FD;
  - Article 26 EAW FD (on the deduction of periods of detention served in the executing Member State) also supports this interpretation.
- **The requested person can be kept in custody only within the limits of Article 6 Charter** (paras 53–60):
  - Article 12 EAW FD must be read in the light of Article 6 Charter (right to liberty and security of person);
  - in the light of **Article 6 Charter**, the requested person can be held in custody only if the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and insofar as the duration of the custody is not excessive;
  - the executing judicial authority needs to carry out a **concrete review of the situation** at issue, taking account of all the **relevant factors**, including possible failure to act on the part of the authorities of the Member States concerned; any contribution of the requested person to the duration; the sentence potentially faced by the requested person or delivered in their regard in relation the acts which lead to the issuing of the EAW; the potential risk of the person absconding; and the fact that the person has been held in custody for a period the total of which greatly exceeds the time limits stipulated in Article 17 EAW FD.
- **If the person is provisionally released, measures might need to be implemented until a final decision on the execution of the EAW has been taken** (para 61):

- if, after the review, the executing judicial authority concludes that it must bring the requested person's custody to an end, it is required, in the light of Articles 12 and 17(5) EAW FD, to attach to the provisional release of that person any measures it deems necessary:
  - to prevent them from absconding;
  - to ensure that the material conditions necessary for their effective surrender remain fulfilled.

### Case C-640/15, *Vilkas*, Judgment of 25 January 2017.

- **Facts.** Vilkas was a subject of two EAWs issued by a Lithuanian court. The Irish authorities attempted to surrender him to the Lithuanian authorities by using a commercial flight. However, he was not allowed on the flight because of the resistance he put up. Two weeks later, a second surrender attempt, also by means of a commercial flight, failed following a series of similar events. The Irish Minister for Justice and Equality then applied to the High Court (Ireland) for authorisation for a third attempt at surrendering Vilkas. However, the High Court held that it lacked jurisdiction to hear this application and ordered Vilkas's release. The Minister for Justice and Equality brought an appeal against that judgment before the Court of Appeal, which stayed the proceedings and referred the case to the CJEU.
- **Main question.** Does Article 23 EAW FD preclude, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities from agreeing on a new surrender date where the repeated resistance of the requested person has prevented his surrender within 10 days of the new, agreed surrender date?
- **The CJEU's reply.** **Article 23(3) EAW FD must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, insofar as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain. Articles 15(1) and 23 EAW FD must be interpreted as meaning that those authorities remain obliged to agree on a new surrender date if the time limits prescribed in Article 23 have expired.** The CJEU's main arguments follow.
  - In the event of force majeure, where two previous surrender attempts failed, a third surrender day must be set.
    - **Rule and exceptions** (paras 21–24). Article 23(2) EAW FD states that the requested person is to be surrendered no later than 10 days after the final decision on the execution of the EAW, but this rule is subject to certain exceptions, particularly in the case of force majeure (Article 23(3) EAW FD).
    - **The wording of Article 23(3) EAW FD** (paras 25–29). This provision does not expressly limit the number of new surrender dates that may be agreed on between the authorities concerned in cases of force majeure. It also does not exclude the setting a new surrender date where surrender has failed more than 10 days after the final decision on the execution of the EAW.
    - **The objective of Article 23 EAW FD** (paras 30–33). This provision is aimed at accelerating judicial cooperation by imposing time limits for adopting EAW decisions.
    - Article 23(3) EAW FD read in the light of Article 23(5) EAW FD (paras 34–39).

- **In the event of force majeure, the requested person can be kept in custody only within the limits of Article 6 Charter** (para 43, with reference to *Lanigan*).
- **The concept of force majeure must be interpreted strictly and refers to unforeseeable circumstances whereby the consequences could not have been avoided in spite of the exercise of all due care** (paras 44–65):
  - the fact that certain requested persons put up resistance to their surrender cannot, in principle, be classified as an ‘unforeseeable’ circumstance;
  - a fortiori, if the requested person has already resisted a first surrender attempt, the fact that they also resist a second surrender attempt cannot normally be regarded as unforeseeable;
  - it is, however, for the referring court to assess whether there were ‘exceptional circumstances’ on the basis of which it is objectively apparent that the resistance put up by the requested person could not have been foreseen by the authorities concerned and that the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities.
- **If the referring court cannot classify the case as a case of ‘force majeure’, the authorities are still required to agree on a new surrender date** (paras 66–72).
  - The principle of mutual recognition imposes an obligation, in principle, to execute the EAW, and there is no limitation of the temporal validity of that obligation in the EAW FD.
  - Article 23(5) EAW FD foresees that, in cases of expiry of the time limits, the requested person is to be released if they are still being held in custody. This provision does not confer any other effect on the expiry of those time limits. It does not provide that the expiry deprives the authorities concerned of the possibility of agreeing on a surrender date nor that it releases the executing Member State from the obligation to give effect to an EAW.
  - The objective of the EAW FD of accelerating and simplifying judicial cooperation also supports this interpretation.

### Case C-492/18 PPU, *TC*, Judgment of 12 February 2019.

- **Facts.** Dutch authorities arrested TC in the Netherlands based on an EAW issued by the United Kingdom. The United Kingdom suspected TC of having been involved as a senior member of an organised crime group in the importation, sale and supply of hard drugs. The Netherlands transposed Article 17 EAW FD in such a way that the executing judicial authority must, in all cases, suspend the detention pending surrender of the requested person once the 90-day period for taking a final decision on the execution of the EAW has expired (Article 22(4) of the Dutch law on the surrender of sentenced persons). The referring Dutch court was of the opinion that the obligation to always release the arrested person after 90 days is not in line with EU law. Therefore, it developed case-law that interprets the Dutch law as meaning that, in certain circumstances, the decision period is suspended. Such suspension applies, for instance, when the executing judicial authority decides to refer a question to the CJEU for a preliminary hearing. It also applies if the executing authority decides to await the reply to a question referred for a preliminary ruling by another executing judicial authority or if it decides to postpone the decision on surrender due to a real danger of inhumane detention conditions in the issuing Member State.
- **Main question.** Does the maintenance of the detention pending surrender of a requested person who represents a flight risk, once the detention has continued for more than 90 days after that person’s arrest, contravene Article 6 of the Charter?
- **CJEU’s reply.** The EAW FD precludes a national provision that lays down a general and unconditional obligation to release a requested person arrested pursuant to an EAW as



soon as a period of 90 days from that person's arrest has elapsed where there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures. Article 6 Charter precludes national case-law that allows the requested person to be kept in detention beyond that 90-day period on the basis of an interpretation of that national provision according to which that period is suspended when the executing judicial authority decides to refer a question to the CJEU for a preliminary ruling, or to await the reply to a request for a preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the ground that there could be, in the issuing Member State, a real risk of inhuman or degrading detention conditions, insofar as that case-law does not ensure that that national provision is interpreted in conformity with the EAW FD and entails variations that could result in different periods of continued detention. The CJEU's main arguments follow.

- **Purpose and wording of the EAW FD.**
  - The EAW FD seeks, by the establishment of a simplified and more effective system for the surrender of persons, to facilitate and accelerate judicial cooperation. The objective of accelerating judicial cooperation is present, *inter alia*, in the time limits for adopting decisions relating to an EAW (paras 40–42).
  - There are circumstances that may result in the surrender procedure lasting more than 90 days (para 43).
  - Neither Article 12 nor any other provision of the EAW FD provide that, following the expiry of the time limits stipulated in Article 17, the executing judicial authority is required to release that person provisionally or, *a fortiori*, to release them purely and simply (para 46, with reference to *Lanigan*).
  - A general and unconditional obligation to release the requested person on expiry of the time limits could limit the effectiveness of the surrender system, particularly if there is a very serious risk of absconding that cannot be reduced to an acceptable level by appropriate measures (paras 47–49).
- **Non-observance of time limits and duty to provide information to the issuing judicial authority and to Eurojust/Council.** Any suspension of the period for taking a final decision on the execution of the EAW is permissible only if the executing judicial authority complies with the duty to provide information pursuant to Article 17(4) and (7) EAW FD.
- **Article 12 EAW FD must be interpreted in conformity with Article 6 Charter (right to liberty and security).**
  - Account must be taken of Article 5(1) ECHR for the purpose of interpreting Article 6 Charter as the minimum threshold of protection (para 57).
  - It follows from the case-law of the ECtHR that the fact that any deprivation of liberty must be lawful means not only that it must have a basis in national law but also that that law must be sufficiently accessible, precise and predictable in its application to avoid all risks of arbitrariness (para 58).
  - Individuals arrested in the Netherlands with a view to their surrender are faced with provisions of national law (Article 22(4) of the Dutch surrender law) and EU law (Articles 12 and 17 EAW FD), which are incompatible with each other. They are also confronted with variations in the case-law of the Dutch courts concerning that provision of Dutch law and its interpretation in conformity with EU law (para 75). That variation in national case-law does not make it possible to determine, with the clarity and predictability required by the CJEU's case-law, the period for which a requested person is to be kept in detention in the Netherlands in the context of an EAW issued for them (para 76).



## 10. Requests for additional information

In a number of judgments, the CJEU referred to Article 15(2) EAW FD and gave concrete examples where an executing judicial authority can request additional information which it considers necessary to enable it to make a decision on the surrender. Such information can, inter alia, relate to information on the reason why the EAW does not mention a national arrest warrant (*Bob-Dogi*), information on the conditions in which it is envisaged that the individual concerned will be detained in the issuing Member State (e.g. *Aranyosi and Căldăraru*; *ML (Conditions of detention in Hungary)*; *Dorobantu*), information on independence of the judiciary (*Minister for Justice and Equality (Deficiencies in the System of Justice)*), information on the surrender of minors (e.g. *Piotrowski*), information on the precise nature of a judgment delivered in the issuing Member State in the context of a *ne bis in idem* assessment (e.g. *Mantello*), information in relation to *in absentia* judgments (e.g. *Tupikas*) or information on consent in a case of subsequent surrender (e.g. *Melvin West*).

In some of its most recent judgments, the CJEU recalled that Member States are required to comply with the time limits for adopting decisions relating to an EAW (Article 17 EAW FD) and underlined that recourse to Article 15 EAW FD (requests for necessary, supplementary information) may be had only as **a last resort in exceptional cases** (e.g. *ML (Conditions of detention in Hungary)*; *Piotrowski*).

### Case C-261/09, *Mantello*, Judgment of 16 November 2010.

- See *supra* 7.3.

### Case C-241/15, *Bob-Dogi*, Judgment of 1 June 2016.

- See *supra* 3.

### Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of 5 April 2016.

- See *supra* 6.

### Case C-270/17 PPU, *Tupikas*, Judgment of 10 August 2017.

- See *supra* 7.4.

### Case C-367/16, *Piotrowski*, Judgment of 23 January 2018.

- See *supra* 7.1.

### Case C-220/18 PPU, *ML (Conditions of detention in Hungary)*, Judgment of 25 July 2018.

- See *supra* 6.

### Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the System of Justice)*, Judgment of 25 July 2018.

- See *supra* 6.

### Case C-128/18, *Dorobantu*, Judgment of 15 October 2019.

- See *supra* 6.



## 11. Effects of the surrender

The CJEU has clarified in its case-law different aspects related to the effects of the surrender. The CJEU gave some guidance as to the interpretation of the term ‘detention’ of Article 26(1) EAW FD (JZ) as well as of the term ‘offence other than for which the person was surrendered’ and the speciality rule of Article 27 EAW FD (*Leymann and Pustovarov; Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*). The CJEU also explained which Member State needs to give consent in the context of subsequent surrender as regulated in Article 28(2) EAW FD (*Melvin West*). Finally, the CJEU also clarified to what extent a Member State can provide for an appeal with suspensive effect against a decision to execute an EAW or in the context of Articles 27 or 28 EAW FD (*Jeremy F*).

### 11.1. Deduction of period of detention served in the executing Member State

#### Case C-294/16 PPU, JZ, Judgment of 28 July 2016.

- **Facts.** By a judgment of 2007, a Polish court sentenced JZ to a custodial sentence of 3 years and 2 months. As JZ had absconded, an EAW was issued for him and in 2014 JZ was arrested by UK authorities under that EAW. From June 2014 to May 2015, JZ, who was released on bail, was required to stay between 10 p.m. and 7 a.m. at the address which he had provided, and his compliance with that requirement was subject to electronic monitoring. In addition, JZ was required to appear regularly at a police station, to not apply for foreign travel documents and to keep his mobile telephone switched on and charged at all times. Those measures were applied until the date on which he was surrendered to the Polish authorities. JZ requested in the Polish court that the period during which he was subject to a curfew in the United Kingdom and to electronic monitoring count towards the custodial sentence imposed on him in Poland. JZ invoked Article 26 EAW FD, which provides that the issuing Member State is to deduct all periods of detention arising from the execution of that warrant from the total period of detention to be served in that issuing Member State as a result of a custodial sentence or detention order being passed.
- **Main question.** Does the term ‘detention’ of Article 26(1) EAW FD also cover measures applied by the executing Member State that consist in the electronic monitoring of the whereabouts of the subject of the warrant in conjunction with a curfew?
- **The CJEU’s reply.** **Measures such as a 9-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week and a ban on applying for foreign travel documents are not, in principle, having regard to the type, duration, effects and manner of implementation of all those measures, so restrictive as to give rise to a deprivation of liberty comparable to that arising from imprisonment and thus to be classified as ‘detention’ within the meaning of Article 26 EAW FD. It is nevertheless for the referring court to ascertain this.** The CJEU’s main arguments follow.
  - **Conform interpretation** (paras 32 and 33). The CJEU recalls the duty to interpret national law, as much as possible, in the light of the wording and purpose of the EAW FD.
  - The term ‘**detention**’ of Article 26(1) EAW FD is an **autonomous concept of EU law**. This concept must be interpreted uniformly throughout the EU, taking into account the wording, context and objective pursued by the legislation in question (paras 35–37).

- **Article 26(1) EAW FD refers not to a measure that restricts liberty but to one that deprives a person of it** (paras 38–47). After assessing the wording, context and objective of Article 26 EAW FD, the CJEU concluded that one should distinguish between measures that restrict liberty (in principle not included in Article 26) and measures that deprive a person of their liberty (included in Article 26). The concept ‘detention’ of Article 26(1) EAW FD therefore includes, apart from imprisonment, other measures that, owing to their nature, duration, effects and means of implementation, deprive the person concerned of their liberty in a way that is comparable to imprisonment.
- **The ECtHR’s case-law supports this interpretation** (paras 48–52).
- **The assessment is to be made by the issuing judicial authority** (paras 53–56).
  - It is for the issuing judicial authority to assess the measures taken against the person concerned in the executing Member State and to consider whether these measures must be treated in the same way as a deprivation of liberty and therefore constitute ‘detention’. The issuing judicial authority can ask the executing judicial authority to send it all the necessary information. In the course of that assessment, the judicial authority of the Member State which issued the EAW may, under Article 26(2) EAW FD, ask the competent authority of the executing Member State to transmit any information it considers necessary.
  - In principle, a 9-hour daily curfew monitored by means of an electronic tag does not seem to have the effect of depriving a person of their liberty within the meaning of Article 26(1) EAW FD.
  - Article 26(1) EAW FD imposes a minimum level of protection. An issuing judicial authority can decide, on the basis of national law alone, to deduct from the total period of detention all or part of the period during which that person was subject, in the executing Member State, to measures involving not a deprivation of but a restriction of liberty.

## 11.2. Speciality rule

### Case C-388/08, *Leymann and Pustovarov*, Judgment of 1 December 2008.

- **Facts.** Leymann and Pustovarov were wanted for illegal import of drugs into Finland. The Finnish authorities sent EAWs that indicated that Leymann and Pustovarov were suspected of committing a serious drug trafficking offence which related to a large quantity of amphetamines. Leymann and Pustovarov were surrendered to the Finnish authorities on the basis of those EAWs and were remanded in custody. Later, the indictment against Leymann and Pustovarov stated that the serious drug trafficking offence concerned not amphetamines but hashish. Leymann and Pustovarov were both convicted and sentenced to imprisonment. They both appealed and argued that they had been convicted for an offence other than that for which they had been surrendered, contrary to the ‘speciality rule’. The Finnish Supreme Court referred a number of questions on the exact scope of the speciality rule to the CJEU.
- **Main questions.** How must the expression ‘offence other than for which the person was surrendered’ (hereinafter ‘other offence’) of Article 27(2) EAW FD be interpreted and when is consent in accordance with Article 27(4) EAW FD required? Does a modification of the description of the offence – which concerns only the kind of narcotics in question – fall within the classification of ‘other offence’ and thus require consent from the executing authority? How must the exception to the speciality rule in Article 27(3)(c) EAW FD be interpreted, taking into account the consent procedure laid down in Article 27(4) EAW FD?
- **CJEU’s reply.** **To establish whether the offence under consideration is an ‘other offence’ within the meaning of Article 27(2) EAW FD, it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing Member State, are those in respect of which the person was surrendered and whether**

**there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, insofar as they derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 EAW FD. In circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics concerned is not, of itself, to define an offence other than that for which the person was surrendered within the meaning of Article 27(2) EAW FD. The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that, where there is an offence other than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) EAW FD, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained where that restriction is lawful on the basis of other charges which appear in the EAW. The CJEU's main arguments follow.**

- The expression 'other offence' requires a comparison between the description of the offence in the EAW and in the later procedural document to assess whether (paras 55 and 57):
  - the constituent elements of the offence, according to the legal description given by the issuing Member State, are those for which the person was surrendered;
  - there is a sufficient correspondence between the information given in the EAW and that contained in the later procedural document.
- **The speciality rule does not require consent for every modification of the description of the offence** (paras 56 and 57):
  - consent for every modification would go beyond what is implied by the speciality rule and interfere with the objective of speeding up and simplifying judicial cooperation as pursued by the EAW FD;
  - modifications concerning the time or place of the offence are allowed if they:
    - derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the EAW;
    - do not alter the nature of the offence;
    - do not lead to grounds for non-execution under Articles 3 and 4 EAW FD.
- **A modification of the description of the offence concerning the kind of narcotics is not, of itself, to define an 'other offence'** (paras 61–63):
  - the indictment relates to the importation of hashish whereas the EAW refers to the importation of amphetamines;
  - the offence is still punishable by imprisonment for a maximum period of at least 3 years;
  - the offence comes under the category 'illegal trafficking in narcotic drugs' of Article 2(2) EAW FD.
- **The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that** (paras 73–76):
  - when there is an 'other offence', consent must, in principle, be requested and obtained if a penalty or a measure involving the deprivation of liberty is to be executed;

- a measure restricting liberty can be imposed on the person before consent has been obtained if the restriction is lawful on the basis of other charges which appear in the EAW;
- the person can be prosecuted and sentenced for the ‘other offence’ before consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when the judgment is given for that offence;
- if, after judgment has been given, the person is sentenced to a penalty or a measure restricting liberty, consent is required to enable that penalty to be executed.

### **Case C-195/20 PPU, *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*, Judgment of 24 September 2020.**

- **Facts.** XC was prosecuted in Germany in three separate sets of criminal proceedings. First, in 2011, he was sentenced to a combined custodial sentence of 1 year and 9 months. That sentence was suspended on probation. Second, in 2016, criminal proceedings were instituted in Germany against XC for an offence committed in Portugal. Since XC was in Portugal, the German authorities issued an EAW in order to prosecute XC for that offence. The Portuguese executing authority authorised XC’s surrender to the German judicial authorities. XC received a custodial sentence of 1 year and 3 months. During the execution of that sentence, the suspension on probation of the sentence imposed in 2011 was revoked. Therefore, on 22 August 2018, the German authorities asked the Portuguese executing authority to renounce the application of the speciality rule and consent to the execution of the sentence imposed in 2011. In the absence of any response from the Portuguese executing judicial authority, XC was released. In 2018, he went to the Netherlands and later to Italy. The next day, the German authorities issued a new EAW against XC for the purposes of executing the first judgment of 2011. XC was arrested in Italy in execution of that EAW and surrendered to Germany. Third, in 2018, a new arrest warrant was issued in Germany for the purposes of the conduct of a criminal investigation into a third case involving XC relating to an offence committed in Portugal in 2005. Therefore, the German authorities asked the Italian executing authority also to give consent for XC to be prosecuted for that offence. That authority granted the request and XC was remanded in custody in Germany pursuant to the national arrest warrant. During that period, by judgment of 2019, XC was convicted in the third case for the offence committed in Portugal in 2005 and he received a combined custodial sentence of 7 years, taking into account the judgment of 2011. XC brought an appeal on a point of law against that judgment before the referring court, relying on the speciality rule laid down in Article 27 EAW FD. He claims, in essence, that, in so far as the Portuguese executing judicial authority did not consent to his prosecution for the offence committed in Portugal, the German authorities were not entitled to prosecute him. In view of that argument, the referring court is uncertain whether the arrest warrant of 5 November 2018 can be maintained or must be annulled.
- **Main question.** Does the rule of speciality under Article 27(2) and (3) EAW FD allow the adoption of a measure involving a deprivation of liberty against a person subject to a first EAW on the basis of an offence different to that which constituted the basis for his or her surrender under that EAW and prior to that offence, when that person’s departure from the Member State which issued the first EAW was voluntary and he or she was surrendered to that Member State under a second EAW issued after that departure for the purposes of executing a custodial sentence, provided that, under the second EAW, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty?
- **CJEU’s reply.** **Article 27(2) and (3) EAW FD must be interpreted as meaning that the rule of speciality does not preclude a measure involving a deprivation of liberty taken against**

a person subject to a first EAW on the basis of an offence different to that which constituted the basis for his or her surrender under that EAW and prior to that offence, when that person's departure from the Member State which issued the first EAW was voluntary and he or she was surrendered to that Member State under a second EAW issued after that departure for the purposes of executing a custodial sentence, provided that, under the second EAW, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty. The CJEU's main arguments follow.

- **The speciality rule is closely connected to the surrender resulting from the execution of a specific EAW:**
  - Articles 27 and 28 EAW FD lay down rules derogating from the principle of mutual recognition and cannot be interpreted in a way which would frustrate the objective pursued by that FD, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States (para 35, with a reference to *Melvin West*);
  - It is apparent from the literal interpretation of Article 27(2) EAW FD that the speciality rule laid is closely connected to the surrender resulting from the execution of a specific EAW. This conclusion is corroborated also by the contextual interpretation (paras 37 and 38);
  - Therefore the speciality rule that could be invoked in relation to the first surrender of XC by Portugal, does not affect the surrender of XC in Germany on the basis of the second EAW. The rule of speciality concerning the first EAW is not applicable to the new criminal proceedings because that criminal proceedings now falls within the execution of the second EAW (para 41);
  - The requirement that consent be given by both the executing judicial authority of the first EAW and the executing judicial authority of the second EAW would hinder the effectiveness of the surrender procedure, thereby undermining the objective pursued by the EAW FD (para 42);
  - Since in the present case, XC's departure from Germany was voluntary, once he had served his sentence in that Member State for the offence referred to in the first EAW, he is no longer entitled to rely on the speciality rule relating to the first EAW.
  - Therefore, the only surrender relevant to the assessment of compliance with the speciality rule is the one carried out on the basis of the second EAW, the consent required in Article 27(3)(g) of Framework Decision 2002/584 must be given only by the executing judicial authority of the Member State which surrendered the prosecuted person on the basis of that EAW.

### 11.3. Subsequent surrender

#### Case C-192/12 PPU, *Melvin West*, Judgment of 28 June 2012.

- **Facts.** Melvin West, a national and resident of the United Kingdom, was the subject of three successive EAWs. First, he had been surrendered by the judicial authorities of the United Kingdom (the first executing Member State) to Hungary pursuant to an EAW issued by the Hungarian national authorities for the purposes of conducting a criminal prosecution. Second, he was surrendered by Hungary (the second executing Member State) to Finland pursuant to an EAW issued by the Finnish judicial authorities for the purposes of execution of a custodial sentence. Third, he was subject to a surrender procedure in relation to an EAW issued by the French authorities for the purposes of execution of a custodial sentence imposed *in absentia* for

crimes committed prior to the first surrender. The Supreme Court of Finland (the third executing Member State) had some doubts and referred the case to the CJEU.

- **Main question.** Does ‘executing Member State’ (Article 28(2) EAW FD) mean the Member State from which a person was originally surrendered to a second Member State on the basis of an EAW or the second Member State from which the person was surrendered to a third Member State which is now requested to surrender the person onward to a fourth Member State? Or is consent required from multiple Member States?
- **The CJEU’s reply.** **Article 28(2) EAW FD must be interpreted as meaning that the subsequent surrender of the requested person to a Member State other than the Member State having last surrendered the person is subject to the consent only of the Member State which carried out that last surrender.** The CJEU’s main arguments follow:
  - the wording of Article 28(2) EAW FD (paras 50–52);
  - the objective pursued by the EAW FD of accelerating and simplifying judicial cooperation between the Member States (paras 53–62).

## 11.4. Appeal with suspensive effect

### Case C-168/13 PPU, *Jeremy F*, Judgment of 30 May 2013.

- **Facts.** Jeremy F, a UK national, was surrendered from France to the United Kingdom for child abduction. He had declared before the French Court of Appeal that he consented to his surrender to the United Kingdom, without, however, waiving the speciality rule. Shortly afterwards, the chief prosecutor before the French Court of Appeal received a request from the judicial authorities of the United Kingdom seeking the consent of the investigation chamber of the French Court of Appeal for the prosecution of Jeremy F for acts committed in the United Kingdom before his surrender, namely sexual activity with a child under 16 years of age. By judgment of 15 January 2013, the French Court of Appeal decided to give consent to this request. Jeremy F appealed to the French Cassation Court against this judgment. The French Cassation Court referred to the French Constitutional Council a priority question of constitutionality relating to a provision of the French Code of Criminal Procedure which provides that, after a person has been surrendered to another Member State on the basis of an EAW, the investigation chamber must give its ruling within 30 days, not subject to appeal. At issue was the question whether the EAW FD permits such an absence of judicial redress against the decision of the investigation chamber. The question put to the Constitutional Council was whether, by providing that the investigation chamber was to give a ruling that was ‘not subject to appeal’, the French law of criminal procedure was or was not infringing the right to an effective judicial remedy and the principle of equality before the courts. The Constitutional Council considered whether the EAW FD was to be construed as precluding the possibility of such an appeal. Against this background, the French Constitutional Council decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling.
- **Main question.** Must Articles 27(4) and 28(3)(c) EAW FD be interpreted as precluding Member States from providing for an appeal with suspensive effect against a decision to execute an EAW or a decision giving consent to an extension of the warrant or to an onward surrender?
- **The CJEU’s reply.** **Articles 27(4) and 28(3)(c) EAW FD must be interpreted as not precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority which rules, within 30 days from receipt of the request, on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to the person’s surrender pursuant to an EAW, other than that for which the person was surrendered, or to the surrender of the person to a Member State other than the executing Member State, pursuant to an EAW issued for an offence committed**



**prior to the person's surrender, provided that the final decision is adopted within the time limits laid down in Article 17 EAW FD.** The CJEU's main arguments follow.

- **Member States are permitted to provide for an appeal with suspensive effect, but they are not obliged to do so** (paras 37–55).
  - The absence of an express provision does not mean that the EAW FD prevents the Member States from providing for such an appeal or requires them to do so.
  - The EAW FD is not to have the effect of modifying the obligations of Member States as regards respect for the fundamental rights and legal principles enshrined in Article 6 TEU.
  - The entire surrender procedure between Member States is carried out under judicial supervision, including the action by a judicial authority with respect to the consent provided for in Articles 27(4) and 28(3)(c) EAW FD.
  - In the case of a decision to execute an EAW, the possibility of having a right of appeal follows implicitly but necessarily from the expression 'final decision' used in Articles 17(2), (3) and (5) EAW FD. There is no reason to suppose that such a possibility must be excluded in relation to a decision by which the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State.
- **If Member States provide for a right of appeal with suspensive effect, there are certain limits that they must respect** (paras 56–75).
  - As regards a decision to execute an EAW, the below applies.
    - Article 17 EAW FD sets clear time limits which an appeal with suspensive effect must respect.
    - These time limits must be interpreted as requiring the final decision on the execution of the EAW to be taken, in principle, either within 10 days from consent being given to the surrender of the requested person or, in other cases, within 60 days from the person's arrest. Only in specific cases may those periods be extended by an additional 30 days, and only in exceptional circumstances may the time limits prescribed in Article 17 EAW FD not be complied with by a Member State.
  - As regards the decisions to give consent to the extension of the warrant or to an onward surrender, the below applies.
    - Articles 27(4) and 28(3)(c) EAW FD provide that such decision shall be taken 'no later than 30 days after receipt of the request'.
    - Unlike Article 17 EAW FD, these provisions do not set time limits for the 'final decision' but relate only to the original decision and do not concern cases in which such an appeal is brought.
    - It would, however, be contrary to the underlying logic of the EAW FD and to its objectives of accelerating surrender procedures if the periods for adoption of a final decision under Articles 27(4) and 28(3)(c) EAW FD were longer than those laid down in Article 17 EAW FD. Consequently, to ensure the consistent application and interpretation of the EAW FD, any appeal with suspensive effect provided for by the national legislation of a Member State against the decisions referred to in Articles 27(4) and 28(3)(c) EAW FD must, in any event, comply with the time limits laid down in Article 17 EAW FD.

## 12. Transitional regime and relation to other instruments

In its case-law, the CJEU has specified the meaning of Articles 31 and 32 EAW FD (*Santesteban Goicoechea*).

### Case C-296/08 PPU, *Santesteban Goicoechea*, Judgment of 12 August 2008.

- **Facts.** In 2000, Spain requested France to extradite Santesteban Goicoechea, who was serving a sentence in France, in relation to different offences committed in Spain in the early 1990s. The extradition request was done first on the basis of the 1957 European Convention on Extradition but was refused by France on the ground that the offences for which extradition was sought were statute-barred under French law. Subsequently, in 2004, an EAW was issued by Spanish judicial authorities but it was not executed by French judicial authorities in view of the date of the acts and the statement made in relation to Article 32 EAW FD. Then, in 2008, the Spanish authorities requested the extradition on the basis of the 1996 Convention relating to Extradition between the Member States of the EU (1996 Convention). The French court halted the proceedings and referred the case to the CJEU for the interpretation of Articles 31 and 32 EAW FD, which regulate the transitional regime of the EAW FD and its relation to other legal instruments.
- **Main questions.** Must Article 31 EAW FD be interpreted as meaning that, having regard to the word 'replace' in this provision, the failure of a Member State to notify that it intends to apply bilateral or multilateral agreements in accordance with Article 31(2) has the consequence that that Member State cannot make use of extradition procedures other than the EAW procedure with another Member State which has made a statement pursuant to Article 32 EAW FD? Must Article 32 EAW be interpreted as precluding the application by an executing Member State of the 1996 Convention where that convention became applicable in that Member State only after 1 January 2004?
- **CJEU's reply.** **Article 31 EAW FD must be interpreted as referring only to the situation in which the EAW system is applicable, which is not the case where a request for extradition relates to acts committed before a date specified by a Member State in a statement made pursuant to Article 32 EAW FD. Article 32 EAW FD must be interpreted as not precluding the application by an executing Member State of the 1996 Convention even where that convention became applicable in that Member State only after 1 January 2004.** The CJEU's main arguments follow.
  - **Article 31 EAW FD refers only to the situation in which the EAW system is applicable.** It does not apply where an extradition request relates to acts committed **before** a date specified by a Member State in a statement made under Article 32 EAW FD.
    - The aim of the EAW FD was to replace all the previous instruments concerning extradition (para 51).
    - Article 31(1) EAW FD sums up the extradition instruments that are replaced by the EAW FD, including the 1996 Convention (para 53).
    - Article 31(2) EAW FD provides that Member States are allowed to continue to use some bilateral or multilateral extradition instruments. This does not refer to the instruments mentioned in Article 31(1) EAW FD (paras 54–56).
    - Articles 31 and 32 EAW FD refer to distinct situations which are mutually exclusive: Article 31 EAW FD deals with the consequences of the application of the EAW system for international extradition conventions whereas Article 32 EAW FD envisages a situation in which that system does not apply (para 59).

- The instruments mentioned in Article 31(1) EAW FD, including the 1996 Convention, remain relevant in cases covered by a Member State's statement under Article 32 EAW FD (para 58).
- **Article 32 EAW FD allows an executing Member State to apply the 1996 Convention even if that convention became applicable in that Member State only after 1 January 2004:**
  - the application of the 1996 Convention is consistent with the EAW system because the convention can be used only where the EAW system does not apply (para 74);
  - the application of the 1996 Convention is consistent with the objectives of the EU (para 77);
  - according to settled case-law, procedural rules – such as provisions governing the extradition of persons – are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (para 80).



## 13. Extradition of EU citizens to third states

In its case-law, the CJEU has interpreted the provisions on EU citizenship (Article 21(1) TFEU) and non-discrimination based on nationality (Article 18 TFEU) in the context of extradition to a third state (*Petruhhin, Pisciotti, Raugevicius, Ruska Federacija, Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*). The CJEU examined national rules, which draw a distinction between a Member State's own nationals (extradition prohibited) and the nationals of other Member States (extradition can be granted). In order to ensure compliance with Articles 18 and 21(1) TFEU, the CJEU introduced an obligation to carry out a consultation procedure between the requested Member State (which has the disputed national rule) and the Member State of nationality of the EU citizen. The CJEU also clarified questions on a human rights assessment to ensure compliance with the Charter.

**EU citizenship, free movement and non-discrimination.** The CJEU stated that a law that provides for the non-extradition of a Member State's own nationals – while allowing the extradition of EU citizens who are nationals of another Member State – constitutes unequal treatment and gives rise to a restriction of freedom of movement within the meaning of Article 21 of the TFEU. The said restriction can be justified if it is based on a legitimate objective and if it is proportionate. The CJEU agreed that 'preventing the risk of impunity for persons who have committed an offence' is a legitimate objective in EU law. However, the CJEU also found that granting an extradition request is not the most proportionate measure to attain this aim. According to the CJEU, a more proportionate measure than extradition would be to apply all the cooperation and mutual assistance mechanisms provided for in EU criminal law.

**Extradition requests for the purpose of prosecution** (*Petruhhin, Pisciotti, Ruska Federacija, Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*). The requested Member State must inform the Member State of nationality of the extradition request, give that Member State the possibility to issue an EAW, as far as it has jurisdiction, and give priority to that potential EAW over the extradition request. In other words, if the Member State concerned issues an EAW, surrender will have to prevail over extradition. This mechanism should not be different in cases where there is an international agreement on extradition between the EU and the third state involved and that agreement gives the requested Member State the option of not extraditing its own nationals (*Pisciotti*). Similarly, where a Member State is required to rule on an extradition request by a third state concerning a national of an EFTA state, it must before proposing to execute the request for extradition, inform the EFTA state of the request to enable that state to seek the surrender of its national (*Ruska Federacija*).

**Extradition requests for the purpose of the execution of a custodial sentence** (*Raugevicius*). The principle of *ne bis in idem* may be an obstacle to apply the abovementioned mechanism in the context of extradition requests for enforcing a custodial sentence. However, there are other mechanisms under national and/or international law that make it possible for those persons to serve their sentences, in particular in the Member State of which they are nationals, in view of increasing their chances of social rehabilitation, for example the 1983 Convention on the Transfer of Sentenced Persons. Moreover, if the requested person resides permanently in the requested State's territory, the



requested Member State should explore the possibility that the requested person serve the sentence pronounced abroad on its territory (*Raugevicius*).

**Further clarifications on the consultation mechanism.** The CJEU has clarified in its case-law the extent of the consultation mechanism between the requested Member State and the Member State of nationality (*Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*). The CJEU ruled that the requested Member State must inform the Member State of nationality of all the elements of fact and law communicated in the extradition request. The Member States involved are not obliged to ask the third State requesting extradition to send to them a copy of the criminal investigation file. The requested Member State is not obliged to wait for the Member State of which that person is a national to waive by a formal decision the issue of such an arrest warrant, but it must give the latter a reasonable time to issue an EAW. The arrest warrant must concern, at least, the same offences as those referred to in the extradition request. Finally, the requested Member State is not obliged to refuse extradition and itself to conduct a criminal prosecution where its national law permits it to do so.

**Human rights assessment.** The CJEU held that, where a Member State receives a request from a third state seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 of the Charter (*Petruhhin, Raugevicius, Ruska Federacija*). In line with the *Aranyosi and Căldăraru* judgment, the CJEU recalled that the requested Member State must base its assessment on information that is objective, reliable, specific and properly updated.

### Case C-182/15, *Petruhhin*, Judgment of 6 September 2016.

- **Facts.** Russian authorities had issued a request to the Latvian authorities for the extradition of Petruhhin in connection with a drug-trafficking offence. Petruhhin, an Estonian national, had made use of his right to move freely within the EU. Under Latvian law, Latvian citizens are protected against extradition. Petruhhin claimed that – as an EU citizen – he should enjoy the same rights in Latvia as a Latvian national. The Latvian court halted proceedings and referred to the CJEU for the interpretation of Articles 18 and 21(1) TFEU (non-discrimination and EU citizenship) and Article 19 Charter (protection in the event of removal, expulsion or extradition).
- **Main questions.** Must, under Article 18(1) TFEU and Article 21(1) TFEU, an EU citizen enjoy the same level of protection as a national of the Member State in question in the event of an extradition request from a third state to an EU Member State regarding a citizen of another EU Member State? Is, under Article 19 Charter, a Member State that decided to extradite an EU citizen to a third state required to verify that the extradition will not prejudice the rights provided for in Article 19 Charter?
- **The CJEU's reply.** **Articles 18 and 21 TFEU must be interpreted as meaning that, when a Member State to which an EU citizen, a national of another Member State, has moved receives an extradition request from a third state with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the EAW FD, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory. Where a Member State receives a request from a third state seeking the extradition of a national of another Member State, it must verify that the**

**extradition will not prejudice the rights referred to in Article 19 Charter.** The CJEU's main arguments follow.

- **Duty to exchange information with the Member State of origin and priority of a potential EAW over the extradition request.**
  - The unequal treatment which allows the extradition of an EU citizen who is a national of another Member State gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (para 33).
  - Such a restriction can be justified if it based on objective considerations and proportionate to the legitimate objective of the national provision.
    - Legitimate objective (para 37). Preventing the risk of impunity for persons who have committed an offence.
    - Proportionality (paras 38–49). In the absence of EU rules that govern extradition between the EU and the third state involved, the requested Member State must exchange information with the Member State of origin and must give priority to a potential EAW over the extradition request.
- **Impact of the Charter:**
  - the prohibition of inhuman or degrading treatment or punishment included in Article 4 Charter is absolute (para 56);
  - the existence of declarations and accession to international treaties are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR (para 57);
  - if the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third state and it is called on to decide on the extradition of a person to that state, it is bound to assess the existence of that risk (para 58, with reference to *Aranyosi and Căldăraru*);
  - for the purpose of this assessment, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated (para 59).

### Case C-191/16, *Pisciotti*, Judgment of 10 April 2018.

- **Facts.** Pisciotti, an Italian national, had been under investigation in the United States since 2007 for his participation in anti-competitive concerted practices and agreements. In 2010, an EAW was issued against him by a US court. In 2013, Pisciotti was arrested in Germany when his flight from Nigeria to Italy made a stopover at a German airport. Pisciotti was provisionally detained pending extradition and, in 2014, the extradition was approved by a German court. Pisciotti pleaded guilty in the criminal proceedings brought against him and served his prison sentence in the United States. Before his extradition, Pisciotti had brought an action before a German court for a declaration that Germany was liable for having granted his extradition. The referring court halted proceedings and referred to the CJEU for the interpretation of Article 18 TFEU.
- **Main question.** Is Article 18(1) TFEU and the case-law of the CJEU relating to that provision to be interpreted as meaning that a Member State unjustifiably breaches the prohibition of discrimination under Article 18(1) TFEU in the case where, on the basis of a rule of constitutional law (the first sentence of Article 16(2) of the German Basic Law), it treats, in the matter of requests for extradition received from third states, its own nationals and nationals of other Member States differently inasmuch as it extradites only the latter?

- **The CJEU's reply.** In a case in which an EU citizen who has been the subject of a request for extradition to the United States under the Agreement on extradition between the EU and the United States (EU-US Agreement) has been arrested in a Member State other than the Member State of which they are a national, Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition while not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to an EAW and the latter Member State has not taken any action in that regard. The CJEU's main arguments follow.
- Unequal treatment which allows the extradition of an EU citizen who is a national of a Member State other than the requested Member State gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (para 45, with reference to *Petruhhin*).
  - Such a restriction must be proportionate to the legitimate objective pursued and necessary for the protection of the interests and cannot be attained by less restrictive measures. The objective of preventing the risk of impunity for persons who have committed an offence must be considered as a legitimate objective (paras 46–48, with reference to *Runevič-Vardyn and Wardyn* and *Petruhhin*). The exchange of information with the Member State of which the person concerned is a national must be given priority, where relevant, to afford the authorities of that Member State the opportunity to issue an EAW for the purposes of prosecution. This cooperation mechanism does not only apply in a context characterised by the absence of an international agreement on extradition but also in a situation in which the EU-US Agreement gives the requested Member State the option of not extraditing its own nationals (paras 51 and 52, with reference to *Petruhhin*).
  - The cooperation mechanism does not necessarily preclude a request for extradition to a third state by giving priority to an EAW, as the EAW must, at least, relate to the same offences and the issuing Member State must have jurisdiction, pursuant to national law, to prosecute that person for such offences, even if committed outside its territory (para 54, with reference to *Petruhhin*).

### Case C-247/17, *Raugevicius*, Judgment of 13 November 2018.

- **Facts.** Raugevicius is a Lithuanian national who has moved to Finland and has lived there for several years. He is also father to two children residing in Finland and having Finnish nationality. In 2011, Russian authorities convicted him and issued an international arrest warrant for the execution of a custodial sentence. In order to decide on the request for extradition, the Finnish Ministry of Justice asked for an opinion of the Supreme Court of Finland. The Supreme Court notes that, although, in principle, there is an obligation on the requested Member State to proceed against its own nationals, in the situation where it does not extradite them, there is no corresponding obligation to make them serve, on its territory, the sentence imposed on them by a third state. The Supreme Court recalls the *Petruhhin* judgment, but notes that there are differences between the present case (extradition request for serving a custodial sentence), and the case giving rise to the *Petruhhin* judgment (extradition request for the purpose of prosecution). The Supreme Court was uncertain as to whether it should apply an alternative to extradition that is less prejudicial to the exercise of the right to free movement. Therefore, it referred a request for preliminary ruling to the CJEU.

- **Main questions.** Are national provisions on extradition to be assessed with respect to the freedom of movement of nationals of another Member State in the same way, regardless of whether the extradition request of a third state, on the basis of an extradition convention, concerns the enforcement of a custodial sentence or a prosecution as in *Petruhhin*? How is a request for extradition to be answered in a situation in which, the request is notified to another Member State, which, however, does not, because of legal obstacles, for instance, adopt measures concerning its nationals? Is it relevant that the requested person, as well as being a citizen of the Union, is a national of the requesting third state?
- **CJEU's reply.** Articles 18 and 21 TFEU must be interpreted as meaning that, where an extradition request has been made by a third state for an EU citizen who has exercised his right to free movement, not for the purpose of prosecution, but for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the EU for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition. The CJEU's main arguments follow.
  - **Application, by analogy, of the CJEU's *Petruhhin* ruling.**
    - An EU citizen, such as Mr Raugevicius, a national of a Member State (Lithuania), who moved to another Member State (Finland), made use of his right to move freely, so that his situation falls within the scope of Article 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality (para 27, with reference to *Petruhhin*).
    - Holding dual nationality of a Member State and a third State cannot deprive the person concerned of the freedoms he derives from EU law as a national of a Member State (para 29).
    - A national rule which prohibits only Finnish nationals from being extradited introduces a difference in treatment between those nationals and nationals of other Member States and gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (paras 28 and 30, with reference to *Petruhhin*).
    - Such a restriction must be proportionate to the legitimate objective pursued (preventing the risk of impunity) and necessary for the protection of the interests and cannot be attained by less restrictive measures (paras 31 and 32, with reference to *Petruhhin*).
  - **The 'less restrictive measure' depends on the type of extradition request involved.**
    - In relation to extradition request for the purposes of a prosecution, the non-extradition of a Member State's own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals (para 33, with reference to *Petruhhin*).
    - In relation to extradition requests for the purpose of the execution of a custodial sentence, Member States could not prosecute again the same person for the same facts, as this would violate the principle of *ne bis in idem* (para 36). In order to prevent the risk of such persons remaining unpunished, there are mechanisms under national law and/or international law which make it possible for those persons to serve their sentences, in particular, in the State of which they are nationals and, in doing so, increase their chances of social reintegration after they have completed their sentences (para 36). This is, for instance, the case with the Convention on the Transfer of Sentenced Persons, in



- which Russia participates as well (para 37). In addition, Finnish legislation provides that its own nationals can serve a sentence pronounced in another State in its territory (para 38).
- **The 'less restrictive measure' in the case of a requested person who is a long-term resident in the requested Member State.**
    - The Finnish nationals, on the one hand, and, on the other, nationals of other Member States who reside permanently in Finland and demonstrate a certain degree of integration are in a comparable situation (para 46).
    - It is for the referring court to establish whether the requested person falls within that category of nationals of other Member States (para 46).
      - If the court finds that Raugevicius is a permanent resident in Finland, Articles 18 and 21 TFEU require that he should benefit from the provision preventing extradition from being applied to Finnish nationals and may, under the same conditions as Finnish nationals, serve his sentences on Finnish territory (para 470).
      - If the court finds that Raugevicius may not be regarded as residing permanently in the requested Member State, the issue of his extradition is to be settled on the basis of the applicable national or international law (para 48).
  - **Impact of the Charter.** In the event that the requested Member State intends to extradite a national from another Member State at the request of a third state, the first Member State must check that the extradition will not infringe the rights guaranteed by the Charter, in particular Article 19 (para 49, with reference to *Petruhhin*).

### Case C-897/19 PPU, *Ruska Federacija*, Judgment of 2 April 2020.

- **Facts.** On 20 May 2015, I.N., a Russian national was the subject of an international wanted persons notice published by Interpol's bureau in Moscow. On 30 June 2019, I.N., who in the meantime had acquired Icelandic nationality, was arrested in Croatia, where he was on holiday, based on that notice. On 6 August 2019, the Croatian authorities received an extradition request from Russia. Croatian law prohibits the extradition of Croatian nationals, but not the extradition of non-nationals. The Croatian court responsible for ruling on the extradition considered that the legal conditions for extradition were satisfied and permitted it. I.N. lodged an appeal to the Supreme Court of Croatia, challenging that decision. The Supreme Court of Croatia referred the case to the CJEU to know whether the *Petruhhin* case-law also applied in a situation concerning a person who was not an EU citizen, but an Iceland citizen, Iceland being a State of the European Free Trade Association (EFTA) which is party to the Agreement on the European Economic Area (EEA Agreement).
- **Main questions.** Does Article 18 TFEU mean that an EU Member State, which gives a ruling on the extradition to a third State of a national of a Member State of the Schengen area (Schengen State), should inform that Schengen State, which granted nationality to the requested person? If the answer to the preceding question is in the affirmative and the Schengen State has requested the surrender of that person in order to conduct the proceedings in respect of the extradition request, must the EU Member State surrender that person to that Schengen State, in accordance with the Agreement on the surrender procedure?
- **CJEU's reply.** When a Member State must rule on an extradition request by a third State, concerning a national of a State of the EFTA, which is a party to the EEA Agreement, it must verify that that extradition would not infringe the rights covered by Article 19(2) of the Charter. Before proposing to execute the request for extradition, the Member State must inform the EFTA State of the request, to enable that state to seek the surrender of its national if that EFTA State has jurisdiction, pursuant to its national law, to prosecute

**that national for offences committed outside its national territory.** The CJEU's main arguments follow.

- **The situation of an Icelandic national falls within the scope of EU law.**
  - Articles 18 and 21 TFEU do not apply to a national of a third state (paras 40 and 41);
  - The EEA Agreement is an integral part of EU law and is applicable (paras 49–54): Article 36 of the EEA Agreement guarantees the freedom to provide services, in a manner that is identical, in essence to Article 56 TFEU and includes the right to travel to another State to receive services there. In the present case I.N. went to Croatia to spend his holidays and thus to receive services related to tourism.
- **Impact of the Charter.**
  - If the requested person invokes a real risk of inhuman or degrading treatment if extradited, the requested Member State must verify, before carrying out the extradition, that it would not prejudice the rights laid down in Article 19(2) Charter (para 64, with reference to *Petruhhin*).
  - The competent authority of the requested Member State must not restrict itself to taking into consideration solely the declarations of the requesting third State or the accession, by the latter State to international treaties guaranteeing, in principle, respect for fundamental rights. It must rely, for the purposes of that verification, on information that is objective, reliable, specific and properly updated (para 65, with reference to *Petruhhin*).
  - The granting of asylum is a particularly substantial piece of evidence in the context of that verification, particularly since that grant was based precisely on the criminal proceedings that were the basis of the extradition request (paras 66 and 67).
- **Application, by analogy, of the CJEU's *Petruhhin* ruling.**
  - National rules, which do not grant EFTA nationals the protection against extradition enjoyed by nationals of the Member State in question, constitute an unequal treatment, which gives rise to a restriction of freedom of movement (paras 56 and 57, with reference to *Petruhhin*).
  - Such a restriction can be justified if it based on objective considerations and proportionate to the legitimate objective of the national provision (para 59, with reference to *Petruhhin*).
    - Legitimate objective: preventing the risk of impunity for persons who have committed an offence (paras 60–62, with reference to *Petruhhin*).
    - Proportionality: the use of the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law is an alternative means, which is less prejudicial to the exercise of the right to freedom of movement (para 69, with reference to *Petruhhin*).
    - Although the EAW FD does not apply to the Republic of Iceland, that State, like Norway, has concluded with the EU the Agreement on the surrender procedure and the provisions of that Agreement are very similar to the corresponding provisions of the EAW FD (paras 71–74).
    - When a Member State, to which a national of the Republic of Iceland has moved, receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it is in principle obliged to inform the Republic of Iceland. Should that State so request, the Member State should surrender that national to it, in accordance with the provisions of the Agreement on the surrender procedure, if the Republic of

Iceland has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory (para 76).

**Case C-398/19, *Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)*, Judgment of 17 December 2020.**

- **Facts.** BY, who is a national of both Ukraine and Romania, was born in Ukraine and lived in that State until he moved to Germany in 2012. In 2014, he applied for and obtained Romanian nationality as a descendant of Romanian nationals, but he has never resided in Romania. In March 2016, the German authorities received from Ukraine a request for the extradition of BY for conducting a criminal prosecution. In November 2016, the German authorities informed the Romanian Ministry of Justice of the extradition request and asked whether the Romanian authorities envisaged a criminal prosecution of BY. The Romanian Ministry of Justice replied that (i) the Romanian authorities could make a decision to conduct a criminal prosecution only if requested to do so by the Ukrainian judicial authorities and (ii) the issue of an arrest warrant, was subject to there being sufficient evidence of the guilt of the person concerned. That ministry therefore asked the German authorities to provide it with the evidence from the Ukrainian authorities. German law prohibits the extradition of German nationals, but not the extradition of nationals of other Member States. The German court considered that the extradition of BY to Ukraine is lawful, but it is uncertain whether that extradition is not incompatible with the principles set out by the CJEU in the *Petruhhin* judgment, given that the Romanian judicial authorities have not formally made a decision on the possible issue of an EAW. The German court submitted to the CJEU three questions for a preliminary ruling, concerning the interpretation of Articles 18 and 21 TFEU and of the *Petruhhin* judgment.
- **Main questions.** Do the principles in the *Petruhhin* judgment also apply if the individual sought moved his or her centre of interests to the requested Member State at a time when he or she was not yet a Union citizen? Is the home Member State that has been informed of an extradition request obliged, based on the *Petruhhin* judgment, to request that the case files be sent to it by the requesting third State for assessing the possibility of itself undertaking a prosecution? Is a Member State that has been requested by a third State to extradite a Union citizen obliged, based on the *Petruhhin* judgment, to refuse extradition and to undertake a criminal prosecution itself, if it is possible for it to do so under its national law?
- **CJEU's reply.** **Articles 18 and 21 TFEU apply to the situation of a citizen of the EU, who is a national of one Member State, residing in the territory of another Member State even where that citizen moved the centre of his or her interests to that other Member State at a time when he or she did not have Union citizenship. The Member State that received an extradition request may extradite the Union citizen to a third State only after consultation with the Member State of which that citizen is a national. As part of that consultation, the requested Member State must inform the Member State of nationality of all the elements of fact and law communicated in the extradition request. Neither of those Member States is obliged to ask the third State requesting extradition to send to them a copy of the criminal investigation file. The requested Member State is not obliged to wait for the Member State of which that person is a national to waive by a formal decision the issue of such an arrest warrant, but it must give the latter a reasonable time to issue an EAW. Such an arrest warrant must concern, at least, the same offences as those referred to in the extradition request. The requested Member State is not obliged to refuse extradition and itself to conduct a criminal prosecution where its national law permits it to do so. The CJEU's main arguments follow.**

- **Applicability of Articles 18 and 21 TFEU to a person who acquired nationality of an EU Member State at a time when he was already residing in another Member State and/or has dual nationality.**
  - A national of a Member State, who thereby has Union citizenship, and who is lawfully resident in the territory of another Member State, falls within the scope of EU law (para 29).
  - By virtue of having Union citizenship, a national of a Member State residing in another Member State is entitled to rely on Article 21(1) TFEU and falls within the scope of the Treaties, within the meaning of Article 18 TFEU, which sets out the principle of non-discrimination on grounds of nationality (para 30, with reference to *Petruhhin*).
  - The fact that that Union citizen acquired the nationality of a Member State and, therefore, Union citizenship, only at a time when he or she was already residing in a Member State other than that of which he or she subsequently became a national is not capable of invalidating that consideration (para 31).
  - The same can be said of the fact that the Union citizen whose extradition is requested also holds the nationality of the third State, which made that request. Holding dual nationality of a Member State and a third State cannot deprive the person concerned of the freedoms he or she derives from EU law as a national of a Member State (para 32).
  
- **Conformation of the consultation mechanism as referred to in the *Petruhhin* judgment.**
  - The requested State has an obligation to inform the Member State of nationality so that that Member State is in a position to request the surrender (para 43, with reference to *Petruhhin* and para 47, with reference to *Pisciotti*).
  - The exchange of information gives the authorities of the Member State of nationality the opportunity to issue an EAW for the purpose of prosecution (para 43, with reference to *Petruhhin*).
    - If the Member State of nationality issues an EAW, the requested State must surrender the person, in accordance with the provisions of the EAW FD, if the latter Member State has jurisdiction, under its national law, to prosecute the requested person for offences committed outside its national territory. The EAW must relate, at least, to the same offences as those of which that person is accused in the extradition request (paras 43 and 44, with reference to *Petruhhin* and *Pisciotti*).
    - If the Member State of nationality does not issue an EAW, the requested Member State may carry out the extradition, provided that it has verified, as required by the Court's case-law, that that extradition will not prejudice the rights referred to in Article 19 of the Charter (para 45, with reference to *Petruhhin*).
  
- **Further clarification regarding the obligations surrounding the information exchange.**
  - **Informing of extradition request and all matters of fact and law.** The requested Member State must inform the competent authorities of the Member State of nationality not only of the existence of the extradition request, but also of all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request (para 48).

- **Confidentiality.** The requested State is bound to respect the confidentiality of such matters where confidentiality has been sought by that third State (para 48).
  - **Keeping third State informed.** The requested Member State must keep the third State informed of any changes in the situation of the requested person that might be relevant to the possibility of an EAW being issued with respect to that person (para 48).
  - **No obligation to transmit the criminal file.** Neither the requested Member State nor the Member State of nationality can be obliged, under EU law, to make an application to the third State that is requesting extradition for the transmission of the criminal investigation file (para 49). Any decision by the Member State of nationality to ask the third State to send the criminal investigation file, to permit an assessment of the appropriateness of any prosecution, is a matter that is within the discretion of that Member State (para 52).
  - **Reasonable time limit.** It is for the requested Member State to set for the Member State of nationality a reasonable time limit. Such a time limit must take account of all the circumstances of the case, including whether that person may be in custody based on the extradition procedure and the complexity of the case. The requested Member State may carry out the extradition without being obliged to wait, for longer than such a reasonable time, for the Member State of nationality to adopt a formal decision (paras 54 and 55).
- **No obligation under EU law for the requested State to prosecute the person for the offences committed in a third State where the national law of the requested Member State permits it to do so.**
    - If there were an obligation on the requested Member State to refuse extradition and to prosecute, the consequence would be that that Member State would not have the opportunity to decide itself on the appropriateness of conducting a prosecution of that citizen based on national law, in the light of all the circumstances of the particular case, including available evidence. Such an obligation would go beyond the limits that EU law may impose on the exercise of the discretion enjoyed by that Member State with respect to whether or not prosecution is appropriate in an area such as criminal law. Criminal law falls, in accordance with the Court's settled case-law, within the competence of the Member States, even though they must exercise that competence with due regard for EU law (para 65).



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