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From:	EUROJUST
To:	Delegations
Subject:	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Updated overview of case-law by the CJEU = Paper by Eurojust

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Delegations will find attached a paper by Eurojust, containing an updated overview of case-law by the Court of Justice of the European Union on Framework Decision 2002/585/JHA on the European arrest warrant.



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

October 2018

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 surrender procedures between Member States (“EAW FD”). Where relevant, it also refers to the Charter of Fundamental Rights of the European Union (“Charter”), the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR).

The following table of contents, the index of keywords and the summaries of judgments have been prepared by Eurojust. They do not bind the CJEU. The index and summaries are not exhaustive and are to be used only for reference and as a supplementary tool for practitioners.

The text of the judgments of the CJEU can be found, in all official languages of the EU, on the CJEU’s [website](#).

This document has been updated until 15 November 2018.

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## Index of keywords with reference to relevant judgments

Keyword	Articles	Case title	Case number
Additional information	Article 15(2) EAW FD	Mantello Melvin West Aranyosi and Căldăraru  Bob-Dogi	C-261/09 C-192/12 PPU C-404/15 and C-659/15 PPU C-241/15
Admissibility	Article 267 TFEU	AY	C-268/17
Appeal with suspensive effect, <i>see also</i> time limits		Jeremy F.	C-168/13 PPU
Arrest warrant	Article 8(1) EAW FD	Bob-Dogi	C-241/15
Citizenship, <i>see</i> EU citizenship			
Consent, <i>see also</i> subsequent surrender, and <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 J.Z.	C-237/15 PPU C-294/16 PPU
Double criminality	Articles 2(2), 2(4) and 4(1) EAW FD	Advocaten voor de Wereld Openbaar Ministerie v A.	C-303/05 C-463/15 PPU
Equality (principle of)		Advocaten voor de Wereld	C-303/05
EU citizenship and free movement	Article 18 and 21 TFEU	Petruhhin Pisciotti	C-182/15 C-191/16
Extradition	Article 19 Charter	Petruhhin Pisciotti	C-182/15 C-191/16
Fundamental rights: -Right to be heard -Right of the defence -Right to an effective judicial remedy -Member States' constitutions	Articles 47 and 48 Charter  Article 53 Charter	Radu  Melloni	C-396/11  C-399/11
-Right to liberty and security	Article 6 Charter	Lanigan	C-237/15 PPU
-Prohibition of inhuman or degrading treatment	Article 4 Charter	Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
-Right to an independent tribunal, right to a fair trial	Article 47(2) Charter	ML Minister for Justice and Equality (Deficiencies in the System of Justice)	C-220/18 PPU C-216/18 PPU

Guarantees	Article 5 EAW FD	I.B.	C-306/09
<i>In absentia</i>	Article 4a(1) EAW FD	I.B. Melloni Dworzecki Tupikas Zdziaszek Ardic	C-306/09 C-399/11 C-108/16 PPU C-270/17 PPU C-271/17 PPU C-571/17 PPU
Judicial authority	Article 6(1) EAW FD	Poltorak Kovalkosas	C-452/16 PPU C-477/16 PPU
Judicial decision	Article 1(1) EAW FD  Article 8(1)(c)	Poltorak Kovalkosas Özçelik	C-452/16 PPU C-477/16 PPU C-453/16 PPU
Legality (principle of)		Advocaten voor de Wereld	C-303/05
Minors	Article 3(3) EAW FD	Piotrowski	C-367/16
Ne bis in idem	Article 3(2) EAW FD Article 4(3) EAW FD	Mantello AY	C-261/09 C-268/17
Non-discrimination (principle of) Non-discrimination on ground of nationality	Article 18 TFEU	Advocaten voor de Wereld Wolzenburg Lopes Da Silva Jorge Poplawski Petruhhin	C-303/05 C-123/08 C-42/11 C-579/15 C-182/15
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	Kozlowski Wolzenburg Lopes Da Silva Jorge Poplawski	C-66/08 C-123/08 C-42/11 C-579/15
Speciality rule	Article 27 EAW FD	Leymann and Pustovarov	C-388/08
Staying in	Article 4(6) EAW FD	Kozlowski Lopes Da Silva Jorge	C-66/08 C-42/11
Subsequent surrender	Article 28 EAW FD	Melvin West	C-192/12 PPU
Time limits	Article 17 EAW FD	Jeremy F. Lanigan Aranyosi and Căldăraru  Piotrowski Tupikas Zdziaszek ML	C-168/13 PPU C-237/15 PPU C-404/15 and C-659/15 PPU C-367/16 C-270/17 PPU C-271/17 PPU C-220/18 PPU
Withdrawal	Article 50 TEU	RO	C-327/18 PPU

## Chronological list of judgments

1. [C-303/05, \*Advocaten voor de Wereld\*, Judgment of 3 May 2007.](#)
2. [C-66/08, \*Kozłowski\*, Judgment of 17 July 2008.](#)
3. [C-296/08 PPU, \*Santesteban Goicoechea\*, Judgment of 12 August 2008.](#)
4. [C-388/08, \*Leymann and Pustovarov\*, Judgment of 1 December 2008.](#)
5. [C-123/08, \*Wolzenburg\*, Judgment of 6 October 2009.](#)
6. [C- 306/09, \*I.B.\*, Judgment of 21 October 2010.](#)
7. [C-261/09, \*Mantello\*, Judgment of 16 November 2010.](#)
8. [C-192/12 PPU, \*Melvin West\*, Judgment of 28 June 2012.](#)
9. [C-42/11, \*Lopes Da Silva Jorge\*, Judgment of 5 September 2012.](#)
10. [C-396/11, \*Radu\*, Judgment of 29 January 2013.](#)
11. [C-399/11, \*Melloni\*, Judgment of 26 February 2013.](#)
12. [C-168/13 PPU, \*Jeremy F.\*, Judgment of 30 May 2013.](#)
13. [C-237/15 PPU, \*Lanigan\*, Judgment of 16 July 2015.](#)
14. [C-463/15 PPU, \*Openbaar Ministerie v. A.\*, Order of 25 September 2015.](#)
15. [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, \*J.Z.\*, Judgment of 28 July 2016.](#)
19. [Case C-182/15, \*Petruhhin\*, Judgment of 6 September 2016.](#)
20. [Case C-453/16 PPU, \*Özçelik\*, Judgment of 10 November 2016.](#)
21. [Case C-452/16 PPU, \*Poltorak\*, Judgment of 10 November 2016.](#)
22. [Case C- 477/16 PPU, \*Kovalkosas\*, Judgment of 10 November 2016.](#)
23. [Case C-640/15, \*Vilkas\*, Judgment of 25 January 2017.](#)
24. [Case C-579/15, \*Poplawski\*, Judgment of 29 June 2017.](#)
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\*, 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.](#)

In addition, a number of cases dealing with the EAW FD are currently pending before the CJEU, particularly:

- Case C-514/17, *Sut*. Reference made on 23 August 2017. The question referred relates to the interpretation of Article 4(6) EAW FD (refusal to execute an EAW related to nationals/residents). Opinion of AG Bot of 6 September 2018.
- Case C-128/18, *Dorobantu*. Reference made on 16 February 2018. The question referred relates to the interpretation of Article 4 Charter (prison conditions).
- Case C-191/18, *KN*. Reference made on 16 March 2018. The question referred

relates to the interpretation of Article 50 TEU (withdrawal of a Member State from the EU). By order of the President of the Court of 30 May 2018, the request by the Supreme Court (Ireland) that Case C-191/18 be determined pursuant to the expedited procedure was refused.

- Case C-492/18 PPU, **TC**. Reference made on 27 July 2018. The question referred relates to the interpretation of Article 17 EAW FD and Article 6 Charter (right to liberty). Opinion of AG Szpunar of 6 November 2018.
- Case C-508/18, **Minister for Justice and Equality**. Reference made on 6 August 2018. The question referred relates to the interpretation of Article 6(1) EAW FD. By order of the President of the Court of 20 September 2018, the request by the Supreme Court (Ireland) that Case C-508/18 be determined pursuant to the expedited procedure was refused.
- Case C-509/18, **Minister for Justice and Equality**. Reference made on 6 August 2018. The question referred relates to the interpretation of Article 6(1) EAW FD. By order of the President of the Court of 20 September 2018, the request by the Supreme Court (Ireland) that Case C-509/18 be determined pursuant to the expedited procedure was refused.
- Case C-551/18 PPU, **IK**. Reference made in August 2018. The question referred related to the interpretation of Article 8(1)(f) EAW FD. Opinion of AG Sharpston of 8 November 2018.



# 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.

## [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 legislator had not chosen the correct legal instrument, as it should have chosen a “convention”. Secondly, it argued that in so far 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 violates 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 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:
  - **Correct legal instrument:** Under the relevant provisions of the (former) EU Treaty, the Council had discretion to choose amongst 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 harmonize the legislation of Member States with regard to the criminal offences in respect of their constituent elements or of the penalties which they detract. The actual definition of the offences and the penalties applicable are those which 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 feature among those the seriousness of which in terms of adversely affecting public order and public safety justify dispensing with the verification of double criminality (para 56). The distinction between listed and non-listed offences is thus objectively justified (para 57). Moreover, it was not the objective of the EAW FD to harmonise the substantive criminal law of the Member States. The (former) EU Treaty 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).

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

The CJEU interpreted Article 267 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).

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

- See also *infra* 4 (on the obligation to execute an EAW) and 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 Article 3(2) and Article 4(3) EAW FD and also considered it necessary to refer questions to the CJEU in order 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 in order 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:
  - **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 in order to enable it to deliver judgment and the relevance of the questions which it submits (para 24, with reference to *Sleutjes* and other case law).

- **Only 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 these 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 26-27).
- **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 the personal freedom of the latter. 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, in order 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).

### 3. Concept of arrest warrant, judicial decision and issuing judicial authority

The CJEU clarified the meaning of several crucial concepts of the EAW FD, in particular, “arrest warrant”, “judicial decision” and “issuing judicial authority”. The CJEU held, first of all, that if no national arrest warrant, separate from the EAW, exists, the EAW is invalid and the executing authority must refuse to give effect to the EAW on the basis that it does not satisfy the requirements laid down in Article 8(1) EAW FD (*Bob Dogi*). Moreover, the CJEU ruled that the term “judicial authority” is an autonomous concept of EU law. The CJEU specified that the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania do not constitute “judicial authorities” in the meaning of Article 6(1) EAW FD and that EAWs issued by them are not “judicial decisions” in the meaning of Article 1(1) EAW FD (*Poltorak; Kovalkosas*). In relation to the meaning of “judicial decision”, the CJEU also specified that a confirmation by a public prosecutor’s office of a national arrest warrant that was issued by the police, is a “judicial decision” in the meaning of Article 8(1)(c) EAW FD (*Özçelik*). The CJEU also underlined that if the executing authority finds that the EAW does not satisfy the requirements as to lawfulness laid down in the EAW FD that authority must refuse to give effect to it (*Bob-Dogi*).

#### 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 waiting for a decision on the execution of the EAW issued against him. 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 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, he must refuse to give effect to it.** The CJEU’s main arguments:
  - **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 4a EAW FD (paras 61-62).

- **But, 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-452/16 PPU, Poltorak, Judgment of 10 November 2016.**

- **Facts:** A Swedish district court imposed a custodial sentence of one year and three 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 as to 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:
  - **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 as 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 which 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 that 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, Kovalkosas. Judgment of 10 November 2016.

- **Facts:** A Lithuanian court imposed a custodial sentence of four years and six months on Kovalkosas, a Lithuanian national, for acts involving infliction of grievous bodily injury. Subsequently, the Lithuanian Ministry of Justice issued an EAW against Kovalkosas 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 as to 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:
  - **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 in a sense 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 only acts in the strict context of executing a judgment that has become legally binding, handed down by a court following court proceedings, on the one hand, and at the request of a court, on the other, does not call into question this interpretation (paras 46-48):
  - The Lithuanian Ministry of Justice, and not the judge that 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.**

- **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 expressed its doubts as to 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:
  - **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 assimilated with 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 States 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 35-36):**
  - 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 which 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.

## 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, even 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 that, in such scenario, the executing judicial authority is required to adopt a decision on any EAW forwarded to it.** The CJEU's main arguments:
  - **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 which 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 34-35).

## 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. This applies both for assessing whether an act is punishable by a custodial sentence of a maximum of at least twelve months (*Openbaar Ministerie v. A*) and for assessing whether an act is to be considered as a list offence or not (*Advocaten voor de wereld*).

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

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

### [C-463/15 PPU, \*Openbaar Ministerie v. 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 five 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 is under Dutch law only punishable 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 twelve 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 Article 2(4) and Article 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 twelve 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 twelve months. The CJEU’s main arguments:
  - **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 24-25).
  - **The wording of other provisions of the EAW FD:** Neither Article 2(4) and Article 4.1 EAW FD nor any other provisions thereof provide for the possibility of opposing the execution of an EAW concerning an act which, while constituting an offence in the executing Member State, is not there punishable by a custodial sentence of a maximum of at least twelve 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 the first two paragraphs of Article 2 EAW FD, 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).

## 6. Human rights scrutiny

In its case law, the CJEU explained the impact that human rights can have in the context of the EAW FD.

In a first set of judgments, the CJEU ruled on the right to be heard (*Radu*), the right to a fair trial in the context of *in absentia* judgments (*Melloni*) and the right to liberty (*Lanigan*, see *infra* 8).

In later judgments, the CJEU explicitly ruled that an executing judicial authority must refrain from giving effect to an EAW on the basis of Article 1(3) EAW FD if the executing authority 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*) or a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial (*Minister for Justice and Equality (Deficiencies in the System of Justice)*). In these judgments, the CJEU developed the two-stage examination (generic assessment and specific assessment) that the executing judicial authority is required to perform before taking a decision on the execution of the EAW.

In *ML* the CJEU further clarified to what extent an executing judicial authority is required to assess the detention conditions in the issuing Member State. It ruled, for instance, that an executing authority is solely required to assess the detention conditions in the prisons in which it is actually intended that the person concerned will be detained, including on a temporary or transitional basis. It also discussed the value of assurances given by the authorities of the issuing Member State. Finally, it recalled the possibility (and limits) for requesting necessary supplementary information pursuant to Article 15 EAW FD (see also *infra* 9) and underlined that this should be done within the time limits of Article 17 EAW FD (see also *infra* 8).

In relation to areas of human rights where exhaustive harmonisation took place, the CJEU stated that, whenever the EU legislator adopted uniform standards of fundamental rights protection, national courts cannot make the surrender conditional upon the fulfilment of additional national requirements which are not foreseen in that EU legislation (*Melloni*).

### [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 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:
  - **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 33-34);
  - **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 legislator has ensured that the right to be heard will be observed in the executing Member State (paras 41-42).

#### [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 ten 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 as to 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 upon the conviction being open to review in the issuing Member State in order 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 upon a national (constitutional) rule which requires the conviction to be open to review in the issuing Member State. The CJEU's main arguments:
  - **The rights included in Articles 47 and 48(2) Charter are not absolute:** The right of the accused to appear in person at his trial is an essential component of the right to a fair trial, but not an absolute right. It can be waived provided that certain safeguards are met e.g. 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, his right to be present at his trial (para 52).
  - **The scope of Article 53 Charter in light of EU harmonisation:**
    - Under Article 53 Charter, national authorities and courts remain, in principle, free to apply national fundamental rights standards, but only if the level of protection provided for by the Charter, 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 upon 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, would undermine the principles of mutual trust and recognition which the EAW FD purports to uphold and would, therefore, compromise its efficacy (para 63).

[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 one year and eight 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 upon the need for additional information which 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:
  - **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 only allowed in exceptional circumstances** (paras 82-87):
    - In Opinion 2/13 on access 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 assessment must be made** (paras 88-97):
    - **Existence of a general risk:** In order 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, e.g. 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, and inform Eurojust in accordance with Article 17(7) EAW FD, giving the reasons for the delay. 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.
  - **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.
- **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.

- **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 one year and eight 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. In order 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 him 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 him 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:

- **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 it is to fall within the scope of Article 3 ECHR, ill-treatment must attain a minimum level of severity, which depends on all the circumstances of the case, such as the duration of the treatment, its 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*);
    - 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 92-93, with reference to ECtHR, *Muršić*);
    - In the present case, the executing judicial authority must only determine whether the person concerned will be exposed to a real risk in Budapest prison (paras 94-95);
    - 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*);

- 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) 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 which 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- 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 which must, however, be verified by the referring court (para 115).

**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 L.M. for the purpose of conducting criminal prosecutions, *inter alia* for trafficking in narcotic drugs. In May 2017, L.M. 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 questions:** Notwithstanding *Aranyosi and Căldăraru*, where a national court determines 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 his 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 his personal situation, as well as to the nature of the offence for which he is 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 person will run such a risk if he is surrendered to that State. The CJEU's main arguments:
  - **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 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 which 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 his surrender to the issuing Member State, **the requested person will run that risk** (para 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 State’s courts with jurisdiction over the proceedings to which the requested person 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 him, whether there are substantial grounds for believing that he will run a real risk of breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form 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 76-77).

## 7. Refusal grounds and guarantees

The CJEU has repeatedly held that the executing judicial authority may only refuse to execute an EAW in the exhaustively listed cases of obligatory 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, and, moreover, that the execution of the EAW may be made subject only to one of the conditions exhaustively laid down in Article 5 EAW FD. Despite the “exhaustive” nature of the list of refusal grounds and guarantees, 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* and *Poplawski*), *ne bis in idem* (*Mantello* and *AY*), and *in absentia* judgments (*I.B.*, *Melloni* and *Dworzecki*). Whilst 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>1</sup> the CJEU interpreted the refusal ground of a lack of dual criminality in the context of Framework Decision 2008/909/JHA.<sup>2</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

#### [C-367/16. Piotrowski. Judgment of 23 January 2018.](#)

- See also *infra* 8 (on time limits) and 9 (on requests for additional information).
- **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 in so far as the judgment of 2011 was concerned because Piotrowski was seventeen when he committed the offence. The competent Belgian Public Prosecutor appealed against that order as a minor over the age of sixteen *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

<sup>1</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>2</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.



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 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. In order 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:
  - **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 55-56) and that recourse to Article 15 EAW FD (requests for necessary, supplementary information) may only be had as a last resort in exceptional cases (para 61).

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

The rulings in *Kozłowski*, *Wolzenburg*, *Lopes Da Silva Jorge* and *Poplawski* relate to the application of Article 4(6) EAW FD, which allows the executing judicial authority to refuse to execute the 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. It clarified the margin of discretion for national authorities and explained which criteria must be taken in consideration for the interpretation of these terms. The CJEU also underlined 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).

### 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 five months imposed on him by a Polish court. The German court, when assessing possible grounds for refusal, had doubts as to 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 he has established his actual place of residence there and he is “staying” there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence. In order 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 his presence and the family and economic connections which that person has with the executing Member State. The CJEU’s main arguments:
  - **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 Union law that must be given a uniform interpretation throughout the Union (paras 41-43).

- **Meaning of “resident”:** The requested person is “resident” in the executing Member State when he has established his 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 State, he has acquired certain connections with that State which are of a similar degree to those resulting from residence. In order 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 his 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 he 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 upon to carry out in order to decide whether there are grounds for not implementing an EAW (para 51).

**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 one year and nine months imposed on him by a German court. Wolzenburg established his principal residence for just over one 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 only benefit from an application of this ground for non-recognition when two conditions are met: (i) being in the possession of a residence permit of indefinite duration and (ii) having been lawfully resident in the Netherlands for a continuous period of five years. Wolzenburg did not fulfil any of these criteria.
- **Main questions:** 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 five years in the executing Member State, whilst 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 whilst it requires a lawful residence for a continuous period of five 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:
  - **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 State (paras 42-47).
  - **The requirement of a lawful residence for a continuous period of five years for non-nationals, is compatible as:**
    - It pursues a legitimate objective, the reintegration in society (paras 67-68);
    - It is proportionate (paras 69-73).
  - **Supplementary administrative formalities, such as, in particular, a residence permit of indefinite duration, is not compatible as:**
    - Article 19 of Directive 2004/38 does not require Union 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, but does not give rise to any right (para 51).

**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 five 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 notes that Article 695-24 of the French Code of Criminal Procedure, which implements Article 4(6) EAW FD, only applies to French nationals, and therefore decides 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:
  - **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);
    - But, 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 since it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (paras 53-54, 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).

- **Facts:** In 2007, a Polish court gave Poplawski, a Polish national, a one-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, Poplawski 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 as to whether Article 6(2) through (4) OLW was compatible with Article 4(6) EAW FD. The District Court notes 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 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:**

- **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 CJEU's main arguments:

- The execution of the EAW constitutes the rule, while the 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 State "undertakes" to enforce that sentence in accordance with its domestic law (para 20);
- The executing judicial authority must have a margin of discretion as to 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 26-27);

- **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 the purpose of the EAW FD.** The CJEU's main arguments:

- This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU since 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 32-33);
- 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 35-36, 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 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 41-42);
  - In the present case, the duty to interpret the domestic law in 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).** The CJEU's main arguments:
- 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).

### 7.3. Ne bis in idem

In relation to *ne bis in idem*,<sup>3</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).

#### [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 whilst, 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*, such in particular since,

<sup>3</sup> For an overview of the case law of the CJEU on Article 54 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](#).



under German law, as interpreted by the German Federal Court, a subsequent prosecution for participation in a criminal organisation would only be allowed 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:
  - **“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, since 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 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 39-40).
  - **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). Since, in the case at stake, the Italian authorities had clearly stated that the facts upon which the EAW was based had not been 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 49-50).

#### **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 upon in the present case. The CJEU’s main arguments:
  - **Article 3(2) EAW FD (mandatory ground for non-recognition) cannot be relied upon 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);
    - As 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 upon 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 48-49);

- 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 upon 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 (para 61-62).

## 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 (*I.B.*). 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*). 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 Union 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 him (*Tupikas, Zdziaszek, Ardic*).

### C- 306/09, I.B., Judgment of 21 October 2010.

- **Facts:** A Romanian court sentenced I.B., a Romanian national, to four 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 I.B., but ordered that it be served in custody. The decision of the Supreme Court was rendered *in absentia* and I.B. was not personally notified of the date or place of the hearing which led to the decision. I.B. fled to Belgium and the Romanian court of first instance issued an EAW for the arrest of I.B. with a view to executing the sentence of four years’ imprisonment. The Belgian court was uncertain as to 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, I.B. 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 I.B. 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 State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his 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 State in order, as the case may be, to serve there the sentence passed against him, following a new trial organised in his presence in the issuing Member State. An executing Member State may make the surrender of a person in a situation such as that of I.B. subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD. The CJEU's main arguments:
  - 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 the application of Articles 4(6) 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 he would waive his right to a retrial in the issuing Member State in order to ensure that his sentence may be executed in the Member State where he is resident pursuant to Article 4(6) EAW FD (para 59).

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

- **Facts:** See *supra* 5 (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 upon 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 upon the conviction rendered *in absentia* being open to review in the issuing Member State. The CJEU's main arguments:
  - 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 new simplified and more effective system of surrender being based on the principle of mutual recognition (paras 36-37, 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 upon 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 Framework Decision 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).

**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 two years, eight months and six months respectively. The request for a preliminary ruling concerned only surrender for the purpose of executing 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:
  - 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 Union 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 rely not only 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 he tried to avoid service of the summons addressed to him (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).

- See also *infra* 8 (on time limits) and 9 (on requests for additional information).
- **Facts:** In 2017, a Lithuanian court issued an EAW for Tupikas in relation to the execution of a sentence of one year and four 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 be concluded 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 CJUE’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 him, 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:
  - **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 Union 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 him, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case (paras 70-90, 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, but not at first instance, Article 4a(1) does not apply (para 86);
- Conversely, when the person concerned was present at first instance, but not in the proceedings concerned with a fresh assessment of the merits of the case, Article 4a(1) applies and the executing judicial authority must carry out the checks provided in that article (paras 86, 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 his 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).



- **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 takes the view that the situation referred to in Article 4a(1)(b) EAW FD does not apply in the present case, since it is 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) 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), 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 in order to ensure that the rights of the defence of the person concerned are respected during the relevant proceeding. The CJEU’s main arguments:

➤ **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 upon him, such 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 him, 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), he 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 upon 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 his 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).

**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 one year and eight 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 his presence and has had imposed on him 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:
  - 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 interested person. 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 67-68);
- While 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, however, 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 him, a new judicial decision modifies either the nature or the quantum of sentence previously imposed (paras 75-76);
- 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 78-79);
- 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 he has not appeared, that person is not deprived of all rights, in so far as he has the right to be heard a posteriori by the judge and inasmuch as that judge is required to determine whether, in light of the hearing, the suspension revocation decision must be amended (para 85).

## 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 UK 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 UK on the basis, amongst other things, of issues related to the UK’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 UK 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:
  - **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 only allowed in exceptional circumstances** (paras 39-40, 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 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 Union, the person is at risk of being deprived of his 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 UK is party to the ECHR and its continuing participation to that convention is not linked to its being a member of the EU;
  - The UK 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. Time limits

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. In several judgments, the CJEU underlined that Member States are 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). The CJEU also clarified the time limits for surrender of the person mentioned in Article 23 EAW FD (*Vilkas*). The CJEU interpreted, inter alia, 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.

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

- **Facts:** An issuing judicial authority from the UK 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 UK 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 since 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 of the 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 him from absconding and to ensure that the material conditions necessary for his 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:

- **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 35-36);
  - 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 36-37);
  - 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 only makes sense 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 as 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 40-41).
- **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 one assumes 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 only be kept in custody within the limits of Article 6 Charter (paras 53-60):**
  - Article 12 EAW FD must be read in light of Article 6 Charter (right to liberty and security of person);
  - In light of **Article 6 Charter**, the requested person can only be held in custody if the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and in so far 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 his regard in relation the acts which lead to the issuing of the EAW; the potential risk of the person absconding; 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 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 him from absconding;
- to ensure that the material conditions necessary for his effective surrender remain fulfilled.

**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 Mr Vilkas' 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, in so far 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:**

- **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 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 light of Article 23(5) EAW FD** (paras 34-39).
- **In the event of *force majeure*, the requested person can only be kept in custody 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 he also resists 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 case of expiry of the time limits, the requested person is to be released if he is 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.

## 9. 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*), 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 only be had as a **last resort** in **exceptional cases** (e.g. *M.L.*, *Piotrowski*).

### [C-261/09, \*Mantello\*, Judgment of 16 November 2010.](#)

- See *supra* 7.3.

### [C-192/12 PPU \*Melvin West\*, Judgment of 28 June 2012](#)

- See *infra* 10.3.

### [Case C-241/15, \*Bob-Dogi\*, Judgment of 1 June 2016.](#)

- See *supra* 3.

### [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.

### [C-367/16, \*Piotrowski\*, Judgment of 23 January 2018.](#)

- See *supra* 7.1.

### [C-220/18 PPU, \*ML\*, Judgment of 25 July 2018.](#)

- See *supra* 6.

## 10. Effects of the surrender

The CJEU has in its case law clarified 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 (*J.Z.*) as well as of the term “offence other than for which the person was surrendered” (Article 27 EAW FD). 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 Article 27 EAW FD or Article 28 EAW FD (*Jeremy F.*).

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

#### [C-294/16 PPU, J.Z., Judgment of 28 July 2016.](#)

- **Facts:** By a judgment of 2007, a Polish court sentenced J.Z. to a custodial sentence of three years and two months. As J.Z. had absconded, an EAW was issued for him and in 2014 J.Z. was arrested by the UK authorities under that EAW. From June 2014 to May 2015, J.Z., who was released on bail, was required to stay at the address which he had provided between 10 p.m. and 7 a.m., and his compliance with that requirement was subject to electronic monitoring. In addition, J.Z. was required to appear regularly at a police station, not to 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. J.Z. requested in the Polish court that the period during which he was subject to a curfew in the UK and to electronic monitoring count towards the custodial sentence imposed on him in Poland. J.Z. invokes 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 nine-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:

- **Conform interpretation** (paras 32-33): The CJEU recalls the duty to interpret national law, as much as possible, in light of the wording and purpose of the EAW FD.
- The term “**detention**” of Article 26(1) EAW FD is an **autonomous concept of Union 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 concludes that one should distinguish between measures that restrict liberty (in principle not included in Article 26) and measures that deprive a person of his liberty (included in Article 26). The concept “detention” of Article 26(1) EAW FD therefore includes, apart from imprisonment, also other measures that due to their nature, duration, effects and means of implementation deprive the person concerned from his liberty in a way that is comparable to imprisonment.
- **ECtHR 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 him 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 nine-hour daily curfew monitored by means of an electronic tag does not seem to have the effect of depriving a person of his 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 liberty but a restriction of it.

## 10.2. Speciality rule

### 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 and the warrants indicated that they 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. Sometime later, the indictment against Leymann and Pustovarov stated that the serious drug trafficking offence concerned not amphetamines, but hashish. Leymann and Pustovarov meanwhile 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:** (i) 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? (ii) 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? (iii) 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 and main arguments:**
  - **The expression “other offence” requires a comparison between the description of the offence in the EAW and the description in the later procedural document** in order 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 a consent for every modification of the description of the offence** (paras 56-57):
    - A 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;
      - They do not alter the nature of the offence;
      - They 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 such, of itself, as to define “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 three 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, however, 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 in order to enable that penalty to be executed.

### 10.3. Subsequent surrender

#### [C-192/12 PPU \*Melvin West\*, Judgment of 28 June 2012.](#)

- **Facts:** Melvin West, a national and resident of the UK, was the subject of three successive EAWs. First, he had been surrendered by the judicial authorities of the UK (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. Next, 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. Finally, 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 another Member State on the basis of an EAW, or that 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 perhaps required from both 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 him is subject to the consent only of the Member State which carried out that last surrender. The CJEU's main arguments:
  - 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).

## 10.4. 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 UK for child abduction. He had declared before the French court of appeal that he consented to his surrender to the UK, 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 UK seeking the consent of the investigation chamber of the French court of appeal for the prosecution of Jeremy F. for acts committed in the UK before his surrender, namely sexual activity with a child under 16. 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 a 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 and main arguments:**
  - **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), 17(3) and 17(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:
    - 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 his 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:
    - 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.

# 11. 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*).

## C-296/08 PPU, Santesteban Goicoechea, 12 August 2008.

- **Facts:** In 2000, Spain requested France to extradite Goicoechea, who was serving a sentence in France, in relation to different offences committed in Spain in the early nineties. The extradition request was first done on the basis of the 1957 Convention, 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. The French court halted proceedings and referred 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:** (i) 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? (ii) 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 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 whilst 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 since the Convention can only be used where the EAW system does not apply (para 74)
  - The application of the 1996 Convention is consistent with the objectives of the Union (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).

## 12. Extradition of EU citizens

In its case law, the CJEU has interpreted the provisions on EU citizenship (Article 21(1) TFEU) and non-discrimination on the basis of nationality (Article 18 TFEU) in the context of extradition to a third country. The CJEU examined national rules which draw a distinction between a Member State's own nationals (the extradition of whom is prohibited) and the nationals of other Member States (the extradition of whom can be granted). The CJEU ruled that a Member State is not required to extend a prohibition on the extradition of its own nationals to every EU citizen. However, if a Member State receives an extradition request for *prosecution*<sup>4</sup> from a third State, 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 provisions of 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 (*Petruhhin*). In other words, in such circumstances, 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 country involved and that Agreement gives the requested Member State the option of not extraditing its own nationals (*Pisciotti*). The CJEU has also explained that Member States have certain duties under Article 19 Charter when they receive a request from a third State seeking the extradition of a national of another Member (*Petruhhin*).

### **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?

<sup>4</sup> In relation to a case where a Member State received an extradition request for the purpose of *enforcing* a sentence, the CJEU ruled in *Raugevicius* that “Articles 18 and 21 TFEU must be interpreted as meaning that, where an extradition request has been made by a third country 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 European Union 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”. See: [Case C-247/17, \*Raugevicius\*, Judgment of 13 November 2018.](#)

- **The CJEU's reply:**
  - **Article 18 and Article 21 TFEU must be interpreted as meaning that, when a Member State receives an extradition request from a third State, 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 provisions of 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.** The CJEU's main arguments:
    - The unequal treatment which allows the extradition of a Union 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 country 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.
  - **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 Charter.** The CJEU's main arguments:
    - 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 upon 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).

- **Facts:** Pisciotti, an Italian national, had been under investigation in the US since 2007 for his participation in anticompetitive 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 US. 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 questions:** 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 countries, 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 a Union citizen who has been the subject of a request for extradition to the US under the Agreement on extradition between the EU and the US (EU-US Agreement) has been arrested in a Member State other than the Member State of which he is 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 whilst 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:
  - Unequal treatment which allows the extradition of a Union 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 in order, 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 51-52, 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*).
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