Council of the European Union

Brussels, 18 December 2024
(OR. en)

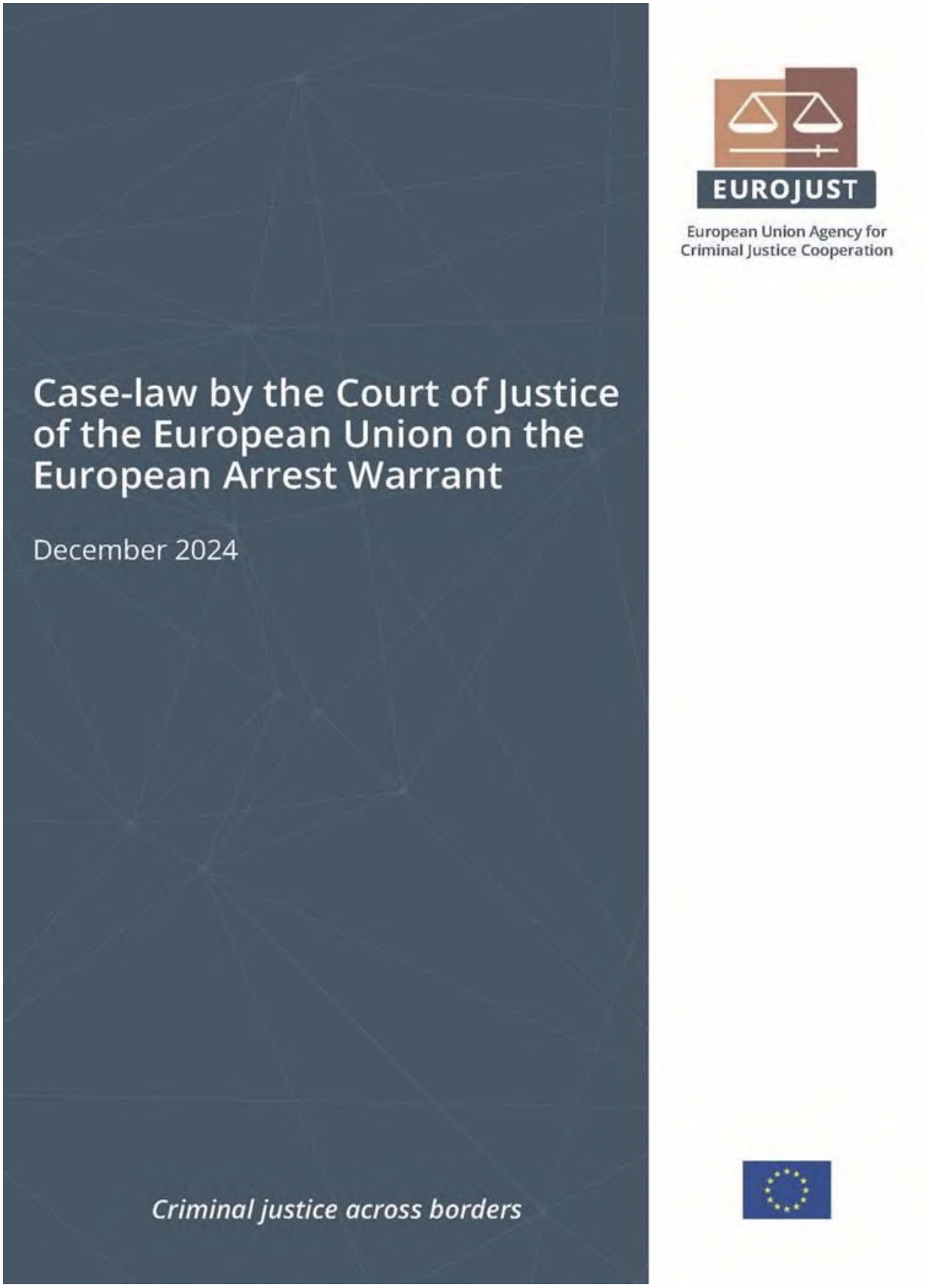
16842/24

COPEN 546
EUROJUST 94
JAI 1869

NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	15293/22, 14046/1/23 REV 1
Subject:	Case-law by the Court of Justice of the European Union on the European Arrest Warrant - Updated overview by Eurojust

Delegations will find attached the above-mentioned overview drafted by Eurojust. The document is also available on Eurojust's website.


EUROJUST
European Union Agency for
Criminal Justice Cooperation
Case-law by the Court of Justice of the European Union on the European Arrest Warrant
December 2024
Criminal justice across borders

Contents

Executive summary 2
Index of keywords with reference to relevant judgments 4
Chronological list of judgments 10
1. Validity of the EAW FD 15
2. Admissibility of a request for a preliminary ruling by an issuing judicial authority 18
3. Content and validity of the EAW: requirements as to the lawfulness of the EAW 23
3.1. National arrest warrant or any other enforceable judicial decision 23
3.2. Penalty imposed 30
3.3. Judicial authority, judicial decision and effective judicial protection 31
4. Possibility to issue several successive EAWs and obligation to decide on their execution 53
5. Scope of the EAW 58
6. Human rights scrutiny 61
7. Refusal grounds 94
7.1. Minors 94
7.2. Nationals, residents and persons staying in the executing Member State 96
7.3. *Ne bis in idem* 107
7.4. Extraterritoriality 116
7.5. *In absentia* judgments 117
7.6. Dual criminality 137
7.7. Notification of a Member State's intention to withdraw from the EU 140
8. Guarantees 142
9. Time limits 148
10. Requests for additional information 156
11. Postponed surrender 160
12. Effects of the surrender 165
12.1. Deduction of period of detention served in the executing Member State 165
12.2. Speciality rule 166
12.3. Subsequent surrender 173
12.4. Appeal with suspensive effect 176
13. Transitional regime and relation to other instruments 179
14. Extradition of EU citizens to third countries 182

Executive summary

This document, which is updated annually, 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 (EAW) and the surrender procedures between Member States (EAW FD).

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

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

The current document provides updates to the following topics in particular.

- **Preliminary ruling mechanism (see Section 2).** The CJEU recalled that if there is no judicial remedy under national law against the issuing judicial authority's decision, the latter is in principle obliged to make a reference to the CJEU, unless the question raised is irrelevant or the correct interpretation of the question is very obvious (*Breian*).
- **Possibility to issue successive EAWs (see Section 4).** The CJEU ruled that an executing authority is not entitled to refuse the execution solely on the grounds that another Member State has refused to execute a first arrest warrant issued against the same person and for the same acts (*Breian*). The executing authority must give due consideration to the reasons underlying that previous decision, within the framework of its own examination (*Breian*).
- **Human rights scrutiny (see Section 6).** The CJEU delivered three judgments in the field of fundamental rights protection. First, in *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, the CJEU applied its two-step test in relation to the right to respect for private and family life and the rights of the child. Secondly, in *Breian*, the CJEU clarified different aspects related to prison conditions, assurances and the right to a fair trial. Thirdly, in *Alchaster*, the CJEU held that the two-step test developed in the context of the EAW FD does not apply in the context of the Trade and Cooperation Agreement (TCA). Under the latter regime, the executing judicial authority must take into account simultaneously both the rules and practices that are generally in place in the United Kingdom and the specific features of the requested person's individual situation.
- **In absentia (see Section 7.5).** The CJEU further clarified different aspects related to *in absentia* judgments such as the concept of 'trial resulting in the decision' (*Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*) and the fact that the EU legislator 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 an executing judicial authority cannot impose any additional/higher requirements based on national law (*Anacco*) and is obliged to execute the EAW if one of the conditions laid down in Article 4a(1) (a) to (d) is met (*Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*). Moreover, if an executing judicial authority finds that none of these conditions is satisfied, it may also rely on other circumstances to conclude that there was no breach of the person's

rights of defence, in particular due to the conduct of the person concerned (*Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*), and thus surrender.

- **Guarantees (see Section 8).** The CJEU clarified that a Member State cannot exclude, absolutely and automatically, third-country nationals staying or resident in their territory from benefiting from a return guarantee under Article 5(3) EAW FD (*PY (Ressortissant d'un État tiers dans l'État membre d'exécution)*).
- **Requests for additional information (see Section 10).** The CJEU underlined in several judgments the importance of requests for additional information and held that in some of these cases, particularly where decisions were based on an analysis of the law of the issuing Member State or detention conditions in that Member State, the executing judicial authority cannot, without infringing the principle of sincere cooperation, make certain findings and refuse the execution of an EAW without having first requested that the issuing judicial authority provide further information concerning those issues (*Breian*). The same applies in the context of the TCA (*Alchaster*).

Index of keywords with reference to relevant judgments

Keyword	Articles	Case title	Case number
Additional information	Article 15(2) EAW FD	Mantello	C-261/09
		Melvin West	C-192/12 PPU
		Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		Bob-Dogi	C-241/15
		Tupikas	C-270/17 PPU
		Piotrowski	C-367/16
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		Minister for Justice and Equality (Deficiencies in the System of Justice)	C-216/18 PPU
		Dorobantu	C-128/18
		Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)	C-428/21 PPU and C-429/21 PPU
		Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)	C-562/21 PPU and C-563/21 PPU
		Minister for Justice and Equality (Levée du sursis)	C-514/21 and C-515/21
		Puig Gordi and Others	C-158/21
		GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)	C-261/22
		Breian	C-318/24 PPU
Admissibility	Article 267 TFEU	AY (Mandat d'arrêt – Témoin)	C-268/17
		Spetsializirana prokuratura (Déclaration des droits)	C-649/19
		AB and Others (Révocation d'une amnistie)	C-203/20
		Puig Gordi and Others	C-158/21
		Breian	C-318/24 PPU
Agreement on Surrender between EU, Norway and Iceland (Surrender Agreement)		Ruska Federacija	C-897/19
	Article 1(3) Surrender Agreement	Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)	C-71/21
Appeal with suspensive effect, *see also* time limits		Jeremy F	C-168/13 PPU
Arrest warrant (content and form of the EAW)	Article 8(1) EAW FD	Bob-Dogi	C-241/15
		Özçelik	C-453/16 PPU
		MM	C-414/20 PPU

		IK (Enforcement of an additional sentence)	C-551/18 PPU
		Svishtov Regional Prosecutor's Office	C-648/20 PPU
		Prosecutor of the regional prosecutor's office in Ruse, Bulgaria	C-206/20
		Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)	C-488/19
Citizenship, *see* EU citizenship			
Consent, *see* subsequent surrender and *see also* speciality rule			
Convention (EU) on Extradition (1996)	Articles 31 and 32 EAW FD	Santesteban Goicoechea	C-296/08 PPU
Custody, *see* detention			
Detention	Articles 12 and 26 EAW FD	Lanigan	C-237/15 PPU
		JZ	C-294/16 PPU
		Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU
Double criminality	Articles 2(2), 2(4) and 4(1) EAW FD	Advocaten voor de Wereld	C-303/05
		A	C-463/15 PPU
		X (European arrest warrant – Double criminality)	C-717/18
		Procureur général près la cour d'appel d'Anger	C-168/21
Equality (principle of)		Advocaten voor de Wereld	C-303/05
EU citizenship and free movement and Extradition	Articles 18 and 21 TFEU	Petruhhin	C-182/15
		Pisciotti	C-191/16
		Raugevicius	C-247/17
		Ruska Federacija	C-897/19
		Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)	C-398/19
		Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)	C-237/21
Extraterritoriality	Article 4(7) EAW FD	Minister for Justice and Equality (Mandat d'arrêt –	C-488/19

		Condamnation dans un État tiers, membre de l'EEE)	
Force majeure, see also time limits	Article 23 EAW FD	Vilkas	C-640/15
		C and CD (Obstacles juridiques à l'exécution d'une décision de remise)	C-804/21 PPU
Fundamental rights scrutiny	—Right to be heard (Articles 47 and 48 Charter)	Radu	C-396/11
	—Member States' constitutions (Article 53 Charter)	Melloni	C-399/11
	—Prohibition of inhuman or degrading treatment (Article 4 Charter)	Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		Dorobantu	C-128/18
		Breian	C-318/24 PPU
	—Right to respect for private and family life and rights of the child (Articles 7 and 23 Charter)	GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)	C-261/22
	—Right to an independent tribunal, right to a fair trial (Article 47(2) Charter)	Minister for Justice and Equality (Deficiencies in the System of Justice)	C-216/18 PPU
		Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)	C-354/20 PPU and C-412/20 PPU
		Breian	C-318/24 PPU
	—Right to a tribunal previously established by law, right to a fair trial (Article 47(2) Charter)	Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)	C-562/21 PPU and C-563/21 PPU
		Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)	C-480/21
		Puig Gordi and Others	C-158/21
	—Principle that offences and penalties must be defined by law (Article 49(1) Charter)	Alchaster	C-202/24
Fundamental rights		Lanigan	C-237/15 PPU
		JZ	C-294/16 PPU

	—Right to liberty and security (Article 6 Charter)	TC	C-492/18 PPU
		Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU
	—Right to an effective remedy and to a fair trial (Article 47 Charter) —Right of defence (Article 48(2) Charter)	Spetsializirana prokuratura (Déclaration des droits)	C-649/19
		MM	C-414/20 PPU
		Svishtov Regional Prosecutor's Office	C-648/20 PPU
		Spetsializirana prokuratura (Informations sur la décision nationale d'arrestation)	C-105/21
		Minister for Justice and Equality (Levée du sursis)	C-514/21 and C-515/21
		Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU
Guarantees	Article 5 EAW FD	IB	C-306/09
		SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution)	C-314/18
		Minister for Justice and Equality (Levée du sursis)	C-514/21 and C-515/21
		PY (Ressortissant d'un État tiers dans l'État membre d'exécution)	C-636/22
In absentia	Article 4a(1) EAW FD	IB	C-306/09
		Melloni	C-399/11
		Dworzecki	C-108/16 PPU
		Tupikas	C-270/17 PPU
		Zdziaszek	C-271/17 PPU
		Ardic	C-571/17 PPU
		Generalstaatsanwaltschaft Hamburg	C-416/20 PPU
		Minister for Justice and Equality (Levée du sursis)	C-514/21 and C-515/21
		Generalstaatsanwaltschaft Berlin (Condamnation par défaut)	C-396/22
			C-397/22
			C-398/22
		Anacco	C-504/24 PPU
Judicial authority (issuing) *and* effective judicial protection	Article 6(1) EAW FD	Poltorak	C-452/16 PPU
		Kovalkovas	C-477/16 PPU
		OG and PI (Parquets de Lübeck and Zwickau)	C-508/18 and C-82/19 PPU

		PF (Prosecutor General of Lithuania)	C-509/18
		Parquet général du Grand-Duché de Luxembourg and de Tours	C-566/19 PPU and C-626/19 PPU
		Openbaar Ministerie (Swedish Public Prosecutor's Office)	C-625/19 PPU
		Openbaar Ministerie (Public Prosecutor, Brussels)	C-627/19 PPU
		MN	C-813/19 PPU
		MM	C-414/20
		Puig Gordi and Others	C-158/21
Judicial authority (executing)	Article 6(2) EAW FD	Openbaar Ministerie (Faux en écritures)	C-510/19
		Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU
Judicial decision, *see also* arrest warrant	Article 1(1) EAW FD	Poltorak	C-452/16 PPU
		Kovalkovas	C-477/16 PPU
		NJ (Parquet de Vienne)	C-489/19 PPU
	Article 8(1)(c) EAW FD	Özçelik	C-453/16 PPU
		Svishtov Regional Prosecutor's Office	C-648/20 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	Mantello	C-261/09
		Juan	C-164/22
	Article 4(3) EAW FD	AY (Mandat d'arrêt – Témoin)	C-268/17
	Article 4(5) EAW FD	X (Mandat d'arrêt européen – Ne bis in idem)	C-665/20 PPU
	Article 50 Charter	AB and Others (Révocation d'une amnistie)	C-203/20
Non-discrimination (principle of) Non-discrimination on ground of nationality	Article 18 TFEU	Advocaten voor de Wereld	C-303/05
		Wolzenburg	C-123/08
		Lopes Da Silva Jorge	C-42/11
		Popławski I	C-579/15
Offence other than for which the person was surrendered, *see* speciality rule			
Postponed surrender	Article 23(4) EAW FD	E.D.L. (Motif de refus fondé sur la maladie)	C-699/21
	Article 24(1) EAW FD	Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU

Prison conditions, *see* fundamental rights (prohibition of inhuman or degrading treatment)			
Resident	Article 4(6) EAW FD	Kozłowski	C-66/08
		Wolzenburg	C-123/08
		Lopes Da Silva Jorge	C-42/11
		Popławski I	C-579/15
		Sut	C-514/17
		Popławski II	C-573/17
		O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)	C-700/21
Speciality rule	Article 27 EAW FD	Leymann and Pustovarov	C-388/08
		Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)	C-195/20 PPU
		Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)	C-428/21 PPU and C-429/21 PPU
		The Minister for Justice and Equality (Demande de consentement – Effets du mandat d'arrêt européen initial)	C-142/22
Staying in	Article 4(6) EAW FD	Kozłowski	C-66/08
		Lopes Da Silva Jorge	C-42/11
Subsequent surrender	Article 28 EAW FD	Melvin West	C-192/12 PPU
		Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)	C-428/21 PPU and C-429/21 PPU
Time limits	Article 17 EAW FD	Jeremy F	C-168/13 PPU
		Lanigan	C-237/15 PPU
		Aranyosi and Căldăraru	C-404/15 and C-659/15 PPU
		Piotrowski	C-367/16
		Tupikas	C-270/17 PPU
		Zdziaszek	C-271/17 PPU
		ML (Conditions of detention in Hungary)	C-220/18 PPU
		TC	C-492/18 PPU
		Dorobantu	C-128/18
		GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)	C-261/22
	Article 23 EAW FD	Vilkas	C-640/15

		C and CD (Obstacles juridiques à l'exécution d'une décision de remise)	C-804/21 PPU
		Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)	C-492/22 PPU
Trade and Cooperation Agreement	Article 632 TCA	Governor of Cloverhill Prison and Others	C-479/21 PPU
Transitional regime	—Articles 31 and 32 EAW FD	Santesteban Goicoechea	C-296/08 PPU
	—Article 62(1)(b) Withdrawal Agreement (WA) —Article 632 TCA	Governor of Cloverhill Prison and Others	C-479/21 PPU
Withdrawal	—Article 50 TEU —Article 62(1)(b) WA	RO	C-327/18 PPU
		Governor of Cloverhill Prison and Others	C-479/21 PPU

Chronological list of judgments[1]

1. Case C-303/05, ***Advocaten voor de Wereld***, Judgment of 3 May 2007.
2. Case C-66/08, ***Kozłowski***, Judgment of 17 July 2008.
3. Case C-296/08 PPU, ***Santesteban Goicoechea***, Judgment of 12 August 2008.
4. Case C-388/08, ***Leymann and Pustovarov***, Judgment of 1 December 2008.
5. Case C-123/08, ***Wolzenburg***, Judgment of 6 October 2009.
6. Case C-306/09, ***IB***, Judgment of 21 October 2010.
7. Case C-261/09, ***Mantello***, Judgment of 16 November 2010.
8. Case C-192/12 PPU, ***Melvin West***, Judgment of 28 June 2012.
9. Case C-42/11, ***Lopes Da Silva Jorge***, Judgment of 5 September 2012.
10. Case C-396/11, ***Radu***, Judgment of 29 January 2013.
11. Case C-399/11, ***Melloni***, Judgment of 26 February 2013.
12. Case C-168/13 PPU, ***Jeremy F***, Judgment of 30 May 2013.
13. Case C-237/15 PPU, ***Lanigan***, Judgment of 16 July 2015.
14. Case C-463/15 PPU, ***A***, Order of 25 September 2015.
15. Joined Cases C-404/15 and C-659/15 PPU, ***Aranyosi and Căldăraru***, Judgment of 5 April 2016.
16. Case C-108/16 PPU, ***Dworzecki***, Judgment of 24 May 2016.
17. Case C-241/15, ***Bob-Dogi***, Judgment of 1 June 2016.
18. Case C-294/16 PPU, ***JZ***, Judgment of 28 July 2016.
19. Case C-182/15, ***Petruhhin***, Judgment of 6 September 2016.
20. Case C-452/16 PPU, ***Poltorak***, Judgment of 10 November 2016.

[1] Judgments/Orders 78 to 85 are new compared to the previous edition of Eurojust's overview of case-law by the CJEU on the EAW (October 2023).

21. Case C-453/16 PPU, ***Özçelik***, Judgment of 10 November 2016.
22. Case C-477/16 PPU, ***Kovalkovas***, Judgment of 10 November 2016.
23. Case C-640/15, ***Vilkas***, Judgment of 25 January 2017.
24. Case C-579/15, ***Popławski***, Judgment of 29 June 2017 (*Popławski I*).
25. Case C-270/17 PPU, ***Tupikas***, Judgment of 10 August 2017.
26. Case C-271/17 PPU, ***Zdziaszek***, Judgment of 10 August 2017.
27. Case C-571/17 PPU, ***Ardic***, Judgment of 22 December 2017.
28. Case C-367/16, ***Piotrowski***, Judgment of 23 January 2018.
29. Case C-191/16, ***Pisciotti***, Judgment of 10 April 2018.
30. Case C-216/18 PPU, ***Minister for Justice and Equality (Deficiencies in the System of Justice)***, Judgment of 25 July 2018.
31. Case C-220/18 PPU, ***ML (Conditions of detention in Hungary)***, Judgment of 25 July 2018.
32. Case C-268/17, ***AY (Mandat d'arrêt – Témoin)***, Judgment of 25 July 2018.
33. Case C-327/18 PPU, ***RO***, Judgment of 19 September 2018.
34. Case C-247/17, ***Raugevicius***, Judgment of 13 November 2018.
35. Case C-551/18 PPU, ***IK (Enforcement of an additional sentence)***, Judgment of 6 December 2018.
36. Case C-514/17, ***Sut***, Judgment of 13 December 2018.
37. Case C-492/18 PPU, ***TC***, Judgment of 12 February 2019.
38. Case C-573/17, ***Popławski***, Judgment of 24 June 2019 (*Popławski II*).
39. Joined Cases C-508/18 and C-82/19 PPU, ***OG and PI (Parquets de Lübeck and Zwickau)***, Judgment of 27 May 2019.
40. Case C-509/18, ***PF (Prosecutor General of Lithuania)***, Judgment of 27 May 2019.
41. Case C-489/19 PPU, ***NJ (Parquet de Vienne)***, Judgment of 9 October 2019.
42. Case C-128/18, ***Dorobantu***, Judgment of 15 October 2019.
43. Joined Cases C-566/19 PPU and C-626/19 PPU, ***Parquet général du Grand-Duché de Luxembourg and de Tours***, Judgment of 12 December 2019.
44. Case C-625/19 PPU, ***Openbaar Ministerie (Swedish Public Prosecutor's Office***, Judgment of 12 December 2019.
45. Case C-627/19 PPU, ***Openbaar Ministerie (Public Prosecutor, Brussels)***, Judgment of 12 December 2019.
46. Case C-813/19 PPU, ***MN***, Order of 21 January 2020.
47. Case C-717/18, ***X (European arrest warrant – Double criminality)***, Judgment of 3 March 2020.
48. Case C-314/18, ***SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution)***, Judgment of 11 March 2020.
49. Case C-897/19, ***Ruska Federacija***, Judgment of 2 April 2020.
50. Case C-195/20 PPO, ***Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)***, Judgment of 24 September 2020.
51. Case C-510/19, ***Openbaar Ministerie (Faux en écritures)***, Judgment of 24 November 2020.
52. Case C-416/20 PPU, ***Generalstaatsanwaltschaft Hamburg***, Judgment of 17 December 2020.

53. Case C-398/19, ***Generalstaatsanwaltschaft Berlin (Extradition vers l'Ukraine)***, Judgment of 17 December 2020.
54. Joined Cases C-354/20 PPU and C-412/20 PPU, ***Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)***, Judgment of 17 December 2020.
55. Case C-414/20 PPU, ***MM***, Judgment of 13 January 2021.
56. Case C-649/19, ***Spetsializirana prokuratura (Déclaration des droits)***, Judgment of 28 January 2021.
57. Case C-648/20 PPU, ***Svishtov Regional Prosecutor's Office***, Judgment of 10 March 2021.
58. Case C-488/19, ***Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)***, Judgment of 17 March 2021.
59. Case C-665/20 PPU, ***X (Mandat d'arrêt européen – Ne bis in idem)***, Judgment of 29 April 2021.
60. Case C-206/20, ***Prosecutor of the regional prosecutor's office in Ruse, Bulgaria***, Order of 22 June 2021.
61. Joined cases C-428/21 PPU and C-429/21 PPU, ***Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)***, Judgment of 26 October 2021.
62. Case C-479/21 PPU, ***Governor of Cloverhill Prison and Others***, Judgment of 16 November 2021.
63. Case C-203/20, ***AB and Others (Révocation d'une amnistie)***, Judgment of 16 December 2021.
64. Joined Cases C-562/21 PPU and C-563/21 PPU, ***Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)***, Judgment of 22 February 2022.
65. Case C-804/21 PPU, ***C and CD (Obstacles juridiques à l'exécution d'une décision de remise)***, Judgment of 28 April 2022.
66. Case C-105/21, ***Spetsializirana prokuratura (Informations sur la décision nationale d'arrestation)***, Judgment of 30 June 2022.
67. Case C-480/21, ***Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)***, Order of 12 July 2022.
68. Case C-168/21, ***Procureur général près la cour d'appel d'Angers***, Judgment of 14 July 2022.
69. Case C-492/22 PPU, ***Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)***, Judgment of 8 December 2022.
70. Case C-237/21, ***Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)***, Judgment of 22 December 2022.
71. Case C- 158/21, ***Puig Gordi and Others***, Judgment of 31 January 2023.
72. Joined Cases C-514/21 and C-515/21, ***Minister for Justice and Equality (Levée du sursis)***, Judgment of 23 March 2023.
73. Case C-699/21, ***E.D.L. (Motif de refus fondé sur la maladie)***, Judgment of 18 April 2023.
74. Case C-700/21 ***O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)***, Judgment of 6 June 2023.
75. Case C-142/22, ***The Minister for Justice and Equality (Demande de consentement – Effets du mandat d'arrêt européen initial)***, Judgment of 6 July 2023.

76. Case C-71/21, ***Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)***, Judgment of 14 September 2023.
77. Case C-164/22, ***Juan***, Judgment of 21 September 2023.
78. Case C-636/22, ***PY (Ressortissant d'un État tiers dans l'État membre d'exécution)***, Order of 16 November 2023.
79. Case C-261/22, ***GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)***, Judgment of 21 December 2023.
80. Case C-396/22, ***Generalstaatsanwaltschaft Berlin (Condamnation par défaut)***, Judgment of 21 December 2023.
81. Case C-397/22, ***Generalstaatsanwaltschaft Berlin (Condamnation par défaut)***, Judgment of 21 December 2023.
82. Case C-398/22, ***Generalstaatsanwaltschaft Berlin (Condamnation par défaut)***, Judgment of 21 December 2023.
83. Case C-318/24 PPU, ***Breian***, Judgment of 29 July 2024.
84. Case C-202/24, ***Alchaster***, Judgment of 29 July 2024.
85. Case C-504/24 PPU, ***Anacco***, Order of 20 September 2024.

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

1. Case C-305/22, ***C.J.*** Request for a preliminary ruling from the Curtea de Apel București (Romania) lodged on 6 May 2022. The questions referred relate to the interpretation of Article 4(6) EAW FD in conjunction with Articles 25 and 4(2) of Framework Decision 2008/909/JHA, and the interpretation of Articles 4(5) and 8(1)(c) EAW FD. Opinion of Advocate General De La Tour of 13 June 2024 and Opinion of Advocate General De La Tour of 12 December 2024.
2. Case C-763/22, ***Procureur de la République () and d'une demande d'extradition)***. Request for a preliminary ruling from the Tribunal judiciaire de Marseille (France) lodged on 16 December 2022. The question concerns the interpretation of Article 16(3) EAW FD, particularly whether a governmental authority is competent to decide between an EAW and a concurrent extradition request issued by a third country. Opinion of Advocate General Emiliou of 5 September 2024.
3. Case C-481/23, ***Sangas***. Request for a preliminary ruling from the Audiencia Nacional (Spain), lodged on 26 July 2023. The questions concern the interpretation of Articles 4(4) and 4(6) EAW FD.
4. Case C-595/23, ***Cuprea***. Request for a preliminary ruling from the Corte di appello di Napoli (Italy) lodged on 26 September 2023. The questions concern the interpretation of Articles 4(6) EAW FD and Regulation 2018/1862 on the Schengen Information System (SIS) and relates to deletion of a SIS alert and discharge of an EAW after an executing State refused to execute the EAW. Opinion of Advocate General De La Tour of 12 December 2024.
5. Case C-641/23, ***Dubers***. Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands), lodged on 26 October 2023. The questions concern the interpretation of Article 5(3) EAW FD (return guarantee) read in conjunction with Article 18 TFEU (principle of non-discrimination based on nationality), Article 17 EAW FD (time limits) and Article 9(1)(d) of FD 2008/909/JHA on the transfer of sentenced persons.
6. Case C-722/23, ***Rugu***. Request for a preliminary ruling from the Cour de cassation (Belgium), lodged on 28 November 2023. The questions concern the interpretation of Article 4(6) EAW FD in combination with a risk of the requested person's fundamental rights being infringed in case of surrender.

7. Case C-798/23, ***Abbottly***. Request for a preliminary ruling from the Supreme Court (Ireland), lodged on 21 December 2023. The questions concern the interpretation of Article 4a(1) EAW FD.
8. Case C-40/24, ***Derterti***. Request for a preliminary ruling from the Corte suprema di cassazione (Italy), lodged on 23 January 2024. The questions concern the interpretation of Article 4a EAW FD (in absentia).
9. Case C-91/24, ***Aucroix***. Request for a preliminary ruling from the Cour de cassation (Belgium), lodged on 6 February 2024. The questions concern the interpretation of Article 4(6) EAW FD in combination with a risk of the requested person's fundamental rights being infringed in case of surrender.
10. Case C-95/24, ***Khuzdar***. Request for a preliminary ruling from the Corte di appello di Napoli (Italy), lodged on 7 February 2024. The questions concern the interpretation of Article 4(6) EAW FD in conjunction with Article 9(1)(i) and Article 25 of Council Framework Decision 2008/909/JHA.
11. Case C-215/24, ***Fira***. Request for a preliminary ruling from the Tribunal Judicial da Comarca do Porto – Juízo Local Criminal de Vila Nova de Gaia (Portugal), lodged on 20 March 2024. The questions concern the interpretation of Article 4(6) EAW FD in combination with FD 2008/909/JHA on the transfer of sentenced persons.
12. Case C-580/24, ***Tsachkov***. Request for a preliminary ruling from the Sofiyski gradski sad (Bulgaria), lodged on 5 September 2024. The question concerns the interpretation of Article 12 and 23(5) EAW FD.
13. Case C-583/24, ***Tagu***. Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands), lodged on 5 September 2024. The question concerns the interpretation of Article 1(3) EAW FD in conjunction with Article 49 (3) Charter (principle of proportionality of criminal offences and penalties).
14. Case C743/24, ***Alchaster II***. Request for a preliminary ruling from the Supreme Court (Ireland), lodged on 24 October 2024. The question is a follow-up question to Case C-202/24 *Alchaster* and concerns the interpretation of Article 49(1) Charter (principle of legality of criminal offences and penalties).

1. Validity of the EAW FD

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

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

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

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

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

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

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

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

The CJEU interpreted Article 267 of the Treaty on the Functioning of the European Union (TFEU), which establishes the preliminary ruling procedure, in the context of the EAW FD and accepted that an **issuing** judicial authority can request a preliminary ruling that concerns obligations of the **executing** judicial authority (*AY (Mandat d'arrêt – Témoin Puig Gordi and Others; Breian)*). The CJEU also ruled that an issuing judicial authority can request a preliminary ruling where the EAW has already been annulled, with a view to maintaining or withdrawing the EAW or adopting a new EAW, or when questions have arisen as to whether the issue of an EAW complies with obligations under EU law ((*Spetsializirana prokuratura* (*Déclaration des droits*); *Puig Gordi and Others; AB and Others (Révocation d'une amnistie); Breian*). Moreover, if there is no judicial remedy under national law against the issuing judicial authority's decision, the latter is in principle obliged to make a reference to the CJEU, unless the question raised is irrelevant or the correct interpretation of the question is very obvious (*Breian*).

Case C-268/17, *AY (Mandat d'arrêt – Témoin)*, Judgment of 25 July 2018.

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

- ***CJEU's reply*. The CJEU dismissed AY's arguments and ruled that the reference for a preliminary ruling was admissible.** The CJEU's main arguments follow.
  - **The assessment for submitting a question lies with the national court.** In the context of Article 267 TFEU, it is solely for the national court to determine both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits (para 24, with reference to *Sleutjes* and other case-law).
  - **In exceptional cases the CJEU may refuse to rule on a question referred by a national court.** The CJEU may refuse where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical or where the CJEU does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (para 25, with reference to *Sleutjes* and other case-law).
  - In the present case, the facts of the case do not seem to correspond to one of the above situations; the referring court brought the matter before the CJEU with a view to adopting a decision to withdraw the EAW issued against AY (paras 26 and 27).
  - **The admissibility is not called into question by the fact that the questions submitted by the *issuing* judicial authority concern the obligations of the *executing* judicial authority.** The issue of an EAW could result in the arrest of the requested person and, therefore, affects their personal freedom. The CJEU has held that, with regard to EAW proceedings, observance of fundamental rights falls primarily within the responsibility of the issuing Member State (para 28, with reference to *Piotrowski*). Therefore, to ensure observance of those rights, which may lead a judicial authority to decide to withdraw the EAW it issued, such an authority must be able to refer questions to the CJEU for a preliminary ruling (para 29).

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

- See also *supra* 1 (on the validity of the EAW FD).
- ***Facts.*** See *supra* 1.
- ***Main question.*** Is the request for a preliminary ruling submitted by the issuing judicial authority admissible where the EAW has already been annulled?
- ***CJEU's reply*. The CJEU dismissed the arguments of the German government and ruled that the reference for a preliminary ruling was admissible.** The CJEU's main arguments follow.
  - The assessment for submitting a question lies with the national court. In the context of Article 267 TFEU, it is solely for the national court to determine both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions that it submits (para 35).
  - In exceptional cases the CJEU may refuse to rule on a question referred by a national court. The CJEU may refuse where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical or where the CJEU does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (para 36).
  - In the present case, the current nature of the dispute and the judicial nature of the proceedings are not in doubt, since the Specialised Public Prosecutor's Office has brought criminal proceedings, which are still ongoing, against IR and the matter was brought before the Court with a view to adopting, depending on the answers provided to the questions referred, a new EAW in respect of IR (paras 37 and 38).
  - With regard to EAW proceedings, observance of fundamental rights falls primarily within the responsibility of the issuing Member State. Therefore, to ensure observance of those rights, which may lead a judicial authority to decide to issue an EAW, such an

authority must be able to refer questions to the CJEU for a preliminary ruling (para 39, with a reference to *AY (Mandat d'arrêt – Témoin)*).

Case C-203/20, *AB and Others (Révocation d'une amnistie)*, Judgment of 16 December 2021.

- See also *infra* 7.3 (on *ne bis in idem*).
- ***Facts.*** In Slovakia, former members of the Slovak security services were accused of having committed a series of offences in 1995, including the abduction of the son of the then Slovak President. In 1998, an amnesty covering those offences was issued. The criminal proceedings instituted in connection with the offences in question were brought to a definitive end in June 2001. Under Slovak legislation, this closure of prosecution had the same effect as a judgment of acquittal. In 2017, the National Council of the Slovak Republic revoked that amnesty, and the Slovak Constitutional Court subsequently found that the Council's resolution was compliant with the constitution. The criminal proceedings that had been brought to an end by the amnesty were then reopened. The Slovak district court before which those proceedings have been brought intends to issue an EAW against one of the accused persons.
- ***Main question.*** Is the request for a preliminary ruling submitted by the issuing judicial authority on the interpretation of Article 50 Charter in the context of the procedure for issuing an EAW admissible where an EAW has not yet been issued?
- ***CJEU's reply.*** **The CJEU confirmed the admissibility of the request for a preliminary ruling.** The CJEU's main arguments follow.
  - It is for the national court to assess the need for a preliminary ruling and the relevance of the questions (para 45).
  - Only in exceptional cases may the CJEU refuse to rule on a question referred by a national court (para 46).
  - In the present case, it is clear from the order for reference that the Slovak court takes the view that the conditions for issuing an EAW against one of the accused persons are, in principle, satisfied, and that it intends to issue an EAW, as it is possible that the person may be in or could travel to another Member State (para 47).
  - The preliminary ruling mechanism aims to ensure that, in all circumstances, EU law has the same effect in all Member States. Thus, national courts have the broadest power, or even obligation, to refer a matter to the CJEU if they consider a case pending before them to raise questions involving interpretation of the provisions of EU law (para 49).
  - The EAW system entails a dual level of protection of procedural rights and fundamental rights that must be enjoyed by the requested person (paras 50–51).
  - With its question, the issuing judicial authority is seeking to comply with the obligations resulting from the EAW FD and, therefore, is implementing EU law (para 52).

Case C- 158/21, *Puig Gordi and Others*, Judgment of 31 January 2023.

- See also *infra* 3.3 (on the validity of the EAW), 4 (on the obligation to execute the EAW), 6 (on human rights scrutiny) and 10 (on requests for additional information).
- ***Facts.*** See *infra* 6 (on human rights scrutiny).
- ***Main question.*** Is the request for a preliminary ruling admissible?
- ***CJEU's reply.*** **The CJEU dismissed the defendants' arguments and ruled that the request for a preliminary ruling was admissible.** The CJEU's main arguments follow.
  - The assessment for submitting a question lies with the national court (para 50).
  - Only in exceptional cases may the CJEU refuse to rule on a question referred by a national court (para 51).
  - In the present case, the purpose of the request for a preliminary ruling is, inter alia, to enable that court to determine whether it may issue a new EAW against Puig Gordi after the refusal of execution of a previous EAW issued against him and whether it must

maintain or withdraw the EAWs issued against other defendants in the main criminal proceedings at issue. Those considerations justify that court being able, as the issuing judicial authority, to refer questions to the CJEU concerning the conditions for the execution of an EAW (paras 52–53).

- The observance of fundamental rights in the context of proceedings relating to an EAW falls primarily within the responsibility of the issuing Member State. An issuing judicial authority must, in order to ensure observance of those rights, be able to refer questions to the CJEU for a preliminary ruling in order to determine whether to maintain or withdraw an EAW or whether it may issue such a warrant (para 54, with reference to *AY (Mandat d'arrêt – Témoin)*).
- The existence of a refusal decision is capable of justifying the referring court's uncertainty as to whether it may, without infringing EU law, issue a new EAW in order to obtain the surrender of Puig Gordi and whether new measures must be adopted as regards the other defendants in the main proceedings (para 56).
- The fact that three of the defendants in the main proceedings enjoy immunity is not capable of establishing that those questions are hypothetical, since other defendants in those proceedings, including Puig Gordi, do not enjoy such immunity (para 58).
- The CJEU has jurisdiction to give preliminary rulings on the interpretation of acts of the institutions of the EU, irrespective of whether or not they have direct effect (para 59).
- Some of the defendants' arguments contradict the information provided by the referring court or do not accurately reflect their questions. In proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the CJEU, the national court alone has jurisdiction to find and assess the facts in the case before it and to interpret and apply national law (paras 60–63).
- The question(s) must be regarded as concerning the interpretation of EU law. Accordingly, the CJEU is required to give a ruling (para 65).

Case C-318/24 PPU, *Breian*, Judgment of 29 July 2024.

- See also *infra* 4 (on the possibility to issue several successive EAWs and obligation to decide on their execution), 6 (on human rights scrutiny) and 10 (on requests for additional information).
- ***Facts.*** See *infra* 6 (on human rights scrutiny).
- ***Main questions.*** Is the request for a preliminary ruling admissible? Is an issuing judicial authority obliged to make a reference for a preliminary ruling to the CJEU before deciding, in the light of the grounds on which the executing judicial authority refused to execute that arrest warrant, whether to withdraw or maintain that warrant?
- ***The CJEU's reply.*** **The request for a preliminary ruling is admissible. Article 267 TFEU must be interpreted as meaning that the issuing judicial authority is not obliged to make a reference for a preliminary ruling to the CJEU before deciding, in the light of the grounds on which the executing judicial authority refused to execute that arrest warrant, whether to withdraw or maintain that warrant, unless there is no judicial remedy under national law against the decision it will be called upon to make, in which case it is, in principle, obliged to make a reference.** The CJEU's main arguments follow.
  - It is apparent from the explanations provided by the referring court that the purpose of the request for a preliminary ruling is, inter alia, to enable that court to determine whether it may issue a new EAW against the requested person, or whether it must withdraw the EAW already issued, should it follow from the CJEU's answer that the refusal to execute the previous warrant was not compatible with EU law (para 30).
  - Those considerations justify that court being able, as the issuing judicial authority, to refer questions to the CJEU concerning the conditions for the execution of an EAW (para 31, with reference to *Puig Gordi and Others*).

- The observance of fundamental rights in the context of proceedings relating to an EAW falls primarily within the responsibility of the issuing Member State. Therefore, and given that the issuance of such a warrant may result in the arrest of the person subject to it, an issuing judicial authority must, in order to ensure observance of those rights, be able to refer questions to the CJEU (para 32, with reference to *Puig Gordi and Others*).
- It follows from Article 267 TFEU that where a question concerning the interpretation of EU law is raised before a court, the latter is only obliged to make a reference for a preliminary ruling if there is no judicial remedy under national law against its decision (paras 63-65).
- In accordance with the CJEU's settled case-law, a court cannot be relieved of that obligation unless it has established that the question raised is irrelevant, that the EU law provision in question has been interpreted by the CJEU or that the correct interpretation of EU law is so obvious that it leaves no scope for any reasonable doubt (para 66).
- The question whether such a possibility exists must be assessed on the basis of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise and the risk of divergences in judicial decisions within the EU (para 67).
- If an issuing judicial authority, against whose decisions there is no judicial remedy under national law, takes the view that it is relieved of its obligation to make a reference to the CJEU, the statement of reasons for its decision must show either that the question of EU law raised is irrelevant for the resolution of the dispute, or that the interpretation of the EU law provision concerned is based on case-law or, in the absence of such case-law, that the interpretation of EU law was so obvious to the national court or tribunal of last instance that it leaves no scope for any reasonable doubt (para 68).

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

The CJEU explained to what extent the non-fulfilment of some of the requirements inherent in Articles 1(1), 6(1) and 8(1) EAW FD can affect the validity of the EAW and interpreted, in this regard, several crucial concepts of the EAW FD. The CJEU held that an executing judicial authority must not give effect to an EAW which does not meet the minimum requirements on which its validity depends, (*Puig Gordi and Others*); *Minister for Justice and Equality (Levée du sursis)*).

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

3.1. National arrest warrant or any other enforceable judicial decision

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

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

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

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

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

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

- In the context of Article 6(1) EAW FD, the term 'judicial authority' refers to Member State authorities that administer criminal justice, excluding police services (para 32, with reference *to Poltorak*).
- The public prosecutor's office constitutes a Member State authority responsible for administering criminal justice (para 34).

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

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

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

to decide, in conformity with its national law, what are the consequences that the absence of a national arrest warrant as legal basis for the issuing of an EAW may have on the decision to keep a person who is subject to criminal prosecution in provisional detention. The CJEU's main arguments follow.

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

Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, Judgment of 10 March 2021.

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

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

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

the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights referred to in Article 1(3) of EAW FD (para 49);

- These considerations are in no way called into question by the case-law in *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)* and *Openbaar Ministerie (Swedish Public Prosecutor's Office).*
  - In this case-law, the CJEU held that procedural rules according to which the proportionality of the decision of the Public Prosecutor's Office to issue an EAW may be subject, before or after the actual surrender of the requested person, to judicial review before or almost at the same time as the EAW is issued and, in any event, after it has been issued, meet the requirement of effective judicial protection (paras 50–52).
  - In the national legislation at issue in those cases, the EAW was based on a national arrest warrant issued by a judge, who, moreover, made an assessment of the conditions to be met when issuing an EAW and, in particular, whether it was proportionate (para 53).
- It cannot be inferred from *MM* that the CJEU ruled that the existence of a possibility of *ex post* judicial review was such as to satisfy the requirements inherent in the effective judicial protection of the rights of the requested person. The CJEU did not rule directly on the question whether the Bulgarian procedure for the issuing of an EAW by a prosecutor during the pre-trial stage of criminal proceedings satisfied the requirements inherent in effective judicial protection, but confined itself to holding that, where the law of the issuing Member State does not contain a separate legal remedy, EU law confers jurisdiction on a court of that Member State to review indirectly the validity of the EAW (para 56);

- **A judicial review of a prosecutor's decision to issue an EAW which takes place only after the requested person is surrendered does not satisfy the obligation of the issuing Member State to implement procedural rules allowing a court to review, prior to that surrender, the lawfulness of the national arrest warrant, also adopted by a prosecutor, or of the EAW** (para 57).
  - The Member States retain their procedural autonomy in implementing the EAW FD. However, they must ensure that their national rules do not frustrate the requirements arising from that framework decision, in particular as regards the judicial protection, guaranteed by Article 47 Charter (para 58).
  - The objective of the EAW FD to facilitate and accelerate judicial cooperation can only be achieved through respect for fundamental rights and legal principles, as enshrined in Article 6 TEU and reflected in the Charter (para 59).

Case C-206/20, *Prosecutor of the regional prosecutor's office in Ruse, Bulgaria*, Order of 22 June 2021.

- See also *infra* under 3.3 (on judicial authority).
- ***Facts.*** A Bulgarian public prosecutor issued an EAW against VA for the purpose of prosecuting him for burglary. The EAW was based on a national arrest warrant issued by the same public prosecutor, ordering the detention of PI for a maximum of 72 hours. VA was arrested in the United Kingdom on the basis of the EAW. The referring court questions whether the fact that both the EAW and the national arrest warrant were issued by a public prosecutor, without the involvement of a court prior to the surrender, is compatible with the dual level of protection required by the EAW FD in *Bob-Dogi* and the requirements inherent in effective judicial protection.
- ***Main question.*** The question was the same as that raised in Case C-648/20 PPU.

- ***CJEU's reply.*** The CJEU's reply and main argumentsare identical to those in the judgment of 10 March 2021 in Case C-648/20 PPU.

Case C-488/19, *Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)*, Judgment of 17 March 2021.

- See also *infra* 7.4 (on extraterritoriality).
- ***Facts.*** A Norwegian court sentenced JR, a Lithuanian national, to a custodial sentence of four years and six months for the unlawful delivery of a very high quantity of drugs. On the basis of a bilateral agreement between Norway and Lithuania, a Lithuanian court recognised the Norwegian judgment so that the sentence could be executed in Lithuania. Norwegian authorities then surrendered JR to Lithuania. In 2016, Lithuanian authorities released JR on parole, accompanied by intensive supervision measures. JR evaded those conditions, absconded and went to Ireland. Since JR had not complied with his supervision conditions, a Lithuanian court ordered that the remainder of the custodial sentence – one year, seven months and 24 days – be executed and issued an EAW for that purpose. Before the Irish court, JR disputed his surrender to Lithuania arguing inter alia that only Norway could request his surrender. The High Court referred a question for a preliminary ruling.
- ***Main question.*** May an EAW be issued on the basis of a judicial decision of the issuing Member State ordering the execution, in that Member State, of a sentence imposed by a court of a third State where, pursuant to a bilateral agreement between those States, the judgment in question has been recognised by a decision of a court of the issuing Member State?
- ***CJEU's reply.*** **Articles 1(1) and Article 8(1)(c) EAW FD must be interpreted as meaning that an EAW may be issued on the basis of a judicial decision of the issuing Member State ordering the execution, in that Member State, of a sentence imposed by a court of a third State where, pursuant to a bilateral agreement between those States, the judgment in question has been recognised by a decision of a court of the issuing Member State. However, the issuing of the EAW is subject to the condition, first, that a custodial sentence of at least four months has been imposed on the requested person and, second, that the procedure leading to the adoption in the third State of the judgment recognised subsequently in the issuing Member State has complied with fundamental rights and, in particular, the obligations arising under Articles 47 and 48 Charter.** The CJEU's main arguments follow.
  - Article 8(1)(c) EAW FD requires a judicial decision that is separate from the decision issuing the EAW (para 43, with reference to *Bob-Dogi*) and that comes from a court or other judicial authority of a Member State (para 43, with reference to *Özçelik*);
  - A judgment delivered by a court of a third State cannot constitute, as such, the basis of an EAW (para 46). However, an act of court of the issuing State recognising such a judgment and rendering it enforceable, satisfies the requirements of Articles 1(1), 2(1) and 8(1)(c)) EAW FD (paras 47–52);
  - The procedure leading to the adoption in the third State of the judgment recognised subsequently in the issuing Member State must have complied with fundamental rights (Articles 47 and 48 Charter).
    - In accordance with settled case-law, the rules of secondary EU law (EAW FD) must be interpreted and applied in compliance with fundamental rights (paras 53–55, with referenceto *Tupikas*).
    - The EAW system entails a dual level of protection (para 56, with reference to *Bob-Dogi*). A decision meeting the requirements inherent in effective judicial protection must be adopted at least at one of the two levels of that protection (paras 57–58, with reference to *Openbaar Ministerie (Public Prosecutor, Brussels)*). It implies verifying compliance with fundamental rights in the

procedure leading to the adoption in the third State of the judgment subsequently recognised in the issuing State (para 58).

- When there is doubt as to compliance with the requirements of compliance with fundamental rights, the executing judicial authority must request the issuing Member State the necessary information under Article 15(2) EAW FD to allow it to decide on surrender (para 59).

3.2. Penalty imposed

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

Case C-551/18 PPU, *IK (Enforcement of an additional sentence)*, Judgment of 6 December 2018.

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

- In the present case, the executing judicial authority was not prevented from applying the rules provided in Articles 3 to 5 EAW FD (para 46).

- **The EAW satisfied the requirement as to lawfulness referred to in Article 8(1)(f) EAW FD.**
  - The requirement to indicate 'the penalty imposed' if there is a final judgment is intended to enable the executing judicial authority to satisfy itself that the EAW falls within the scope of the EAW FD and in particular that it exceeds the threshold set out in Article 2(1) EAW FD (paras 48–51).
  - In the present case, the main sentence of 3 years' imprisonment to which IK was sentenced exceeds that threshold (para 52).
- **The counter-arguments that had been raised should be dismissed.**
  - The basis for the enforcement of the custodial sentences is not the decision of the executing authority but the enforceable judgment pronounced in the issuing Member State (paras 55 and 56).
  - The fact that the executing judicial authority was not informed of the additional sentence does not fall within the scope of the rule of speciality (para 61).
  - Article 15(3) EAW FD does not require the issuing judicial authority to inform the executing judicial authority, after that authority has acceded to the request for surrender, of the existence of an additional sentence so that the executing judicial authority may adopt a decision regarding the possibility of enforcing that sentence in the issuing Member State (paras 62–68).
    - Observance of the rights of the requested person falls primarily within the responsibility of the issuing Member State (para 66).
    - The executing judicial authority's decision is without prejudice to the requested person's opportunity, after surrender, to have recourse, within the legal system of the issuing Member State, to legal remedies that may enable the person to challenge the lawfulness of their detention in a prison of that Member State (para 67).

3.3. Judicial authority, judicial decision and effective judicial protection

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

Issuing judicial authority. In relation to the meaning of 'judicial authority', the CJEU underlined that this term constitutes an autonomous concept of EU law and it is capable of including authorities that, although not necessarily judges or courts, participate in the administration of justice. The CJEU held that the Swedish National Police Board and the Ministry of Justice of the Republic of Lithuania do not constitute 'issuing judicial authorities' in the meaning of Article 6(1) EAW FD (*Poltorak*; *Kovalkovas*). The concept also does not include public prosecutors who are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a

minister for justice, in connection with the adoption of a decision to issue an EAW (*OG and PI (Parquets de Lübeck and Zwickau)*). However, the term 'issuing judicial authority' includes public prosecutors who, while institutionally independent from the judiciary, are responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords them a guarantee of independence from the executive in connection with the issuing of an EAW (*PF (Prosecutor General of Lithuania); Parquet général du Grand-Duché de Luxembourg and de Tours*).
Although it is for the executing judicial authority to ensure, before executing an EAW, that it has indeed been issued by a judicial authority within the meaning of Article 6(1) EAW FD, the executing judicial authority cannot verify, under that provision, that the issuing judicial authority has, in the light of the legal rules of the issuing Member State, jurisdiction to issue an EAW (*Puig Gordi and Others*).

Effective judicial protection. If, in the issuing Member State, the competence to issue an EAW does not lie with a court but with another authority participating in the administration of justice, the decision to issue the EAW and the proportionality of such a decision must be capable of being the subject, in the issuing Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection. This requirement applies only if the EAW was issued for the purpose of prosecution, not if the EAW was issued with a view to executing a custodial sentence. In the latter case, the required judicial review would have been carried out by the enforceable judgment on which the arrest warrant was based (*Openbaar Ministerie (Public Prosecutor, Brussels)*). In relation to EAWs for the purpose of prosecution, it is for the Member States to ensure that their legal orders effectively safeguard the required level of judicial protection by means of the procedural rules that they implement. These rules may vary from one Member State to another. Introducing a separate right of appeal against a public prosecutor's decision to issue an EAW is one possibility, but Member States can also opt for other mechanisms (*Parquet général du Grand-Duché de Luxembourg and de Tours; Openbaar Ministerie (Swedish Public Prosecutor's Office)*). For instance, national procedural rules whereby the court that adopted the national arrest warrant reviews the decision of the public prosecutor's office to issue an EAW before or practically at the same time as that decision is adopted, or subsequently, including after the requested person's surrender, would meet the required threshold (*Parquet général du Grand-Duché de Luxembourg and de Tours; Openbaar Ministerie (Swedish Public Prosecutor's Office)*). Where national law does not provide for a separate remedy, neither before, concomitantly or subsequently to the issuing of the EAW by a public prosecutor, a court, which is called upon to decide on the lawfulness of the provisional detention of a person surrendered in execution of an EAW, must declare its jurisdiction to indirectly review its validity in light of EU law (*MM*). Where both the EAW and the national arrest warrant on which it is based are issued by a public prosecutor, the requirements of effective judicial protection that must be afforded to a person who is the subject of an EAW for the purpose of criminal prosecution presuppose that either the EAW or the national arrest warrant on which it is based be subject to judicial review by a court in the issuing Member State prior to the surrender of the requested person (*Svishtov Regional Prosecutor's Office*). However, a judicial authority, when issuing an EAW, is under no obligation to forward to the person who is the subject of that arrest warrant the national decision on the arrest and information on the possibilities of challenging that decision while that person is still in the executing Member State and has not been surrendered (*Spetsializirana prokuratura (Informations sur la decision nationale d'arrestation)*).

Executing judicial authority. The CJEU interpreted the concept of 'executing judicial authority' within the meaning of Articles 6(2), 24(1), 27(3)(g) and 27(4) EAW FD. The CJEU considered that its abovementioned case-law on the concept of 'issuing judicial authority' (participation in the administration of criminal justice, objectivity and independence) and requirements concerning 'effective judicial protection' could be transposed to the execution phase of EAWs (*Openbaar Ministerie* (*Faux en écritures*); *Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales*)). The CJEU also addressed the implications of a potential finding of unlawfulness of a decision to postpone the surrender for the continued detention of the requested person (*Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales*)).

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

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

- ***Facts.*** A Swedish district court imposed a custodial sentence of 1 year and 3 months on Poltorak, a Polish national, for acts involving infliction of grievous bodily injury. Subsequently, the Swedish police board issued an EAW against Poltorak with a view to executing that sentence in Sweden. The request for execution of the EAW came before the Dutch district court, which had doubts whether a police service is competent to issue an EAW.
- ***Main questions.*** Is the term 'judicial authority', referred to in Article 6(1) EAW FD, an autonomous concept of EU law? Is a police service, such as that at issue in the main proceedings, covered by the term 'issuing judicial authority' within the meaning of Article 6(1) EAW FD? Can the EAW that was issued by that police service with a view to executing a judgment imposing a custodial sentence be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD?
- ***CJEU's reply.*** **The term 'judicial authority' is an autonomous concept of EU law. A police service, such as that at issue in the main proceedings, is not covered by the term 'issuing judicial authority' and an EAW that was issued by that police service cannot be regarded as a 'judicial decision'.** The CJEU's main arguments follow.
  - **Autonomous concept of EU law.** The term 'judicial authority' contained in Article 6(1) EAW FD is an autonomous concept of EU law (paras 30–32).
  - **Meaning of 'judicial authority'.**
    - The term 'judicial authority' is not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the Member State authorities that administer criminal justice (paras 33 and 38).
    - Police services are not covered by the term 'judicial authority' (para 34) for the following reasons.
      - The principle of separation of powers. It is generally accepted that the term 'judiciary' does not cover administrative authorities or police services, which fall within the province of the executive (para 35).
      - The context of the EAW FD (paras 38–42).
        - The entire surrender procedure between Member States is to be carried out under judicial supervision (with reference to *Jeremy F*).

        - Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW because the role of central authorities is limited to practical and administrative assistance for the competent judicial authorities.
    - The objectives of the EAW FD (paras 24–27 and 43–45).
        - The principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review.
        - The issue of an arrest warrant by a non-judicial authority, such as a police service, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
    - The fact that a police service is only competent in the strict context of executing a judgment that was handed down by a court and has become legally binding does not call into question this interpretation (paras 47–51).
        - The decision to issue the EAW is ultimately a matter for that police service and not for a judicial authority.
        - That police service issues the EAW not at the request of the judge who adopted the judgment imposing the custodial sentence but at the request of the prison services.
        - That police service has a discretion over the issue of the EAW and that discretion is not subject to judicial approval ex officio.
- **Meaning of 'judicial decision'.** An EAW issued by that police service with a view to executing a judgment imposing a custodial sentence cannot be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD (para 52).

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

- ***Facts.*** A Lithuanian court imposed a custodial sentence of 4 years and 6 months on Kovalkovas, a Lithuanian national, for acts involving infliction of grievous bodily injury. Subsequently, the Lithuanian Ministry of Justice issued an EAW against Kovalkovas with a view to executing in Lithuania the remainder of that sentence to be served. The request for execution of the EAW came before the Dutch district court, which had doubts whether the Lithuanian Ministry of Justice was competent to issue an EAW.
- ***Main questions.*** Is the term 'judicial authority', referred to in Article 6(1) EAW FD, an autonomous concept of EU law? Is a ministry of justice covered by the term 'issuing judicial authority' within the meaning of Article 6(1) EAW FD? Can an EAW that was issued by that Ministry of Justice with a view to executing the remainder of a custodial sentence be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD?
- ***CJEU's reply.*** **The term 'judicial authority' is an autonomous concept of EU law. A ministry of justice is not covered by the term 'issuing judicial authority', and the EAW that was issued by it cannot be regarded as a 'judicial decision'.** The CJEU's main arguments follow.
    - **Autonomous concept of EU law.** The term 'judicial authority' in Article 6(1) EAW FD is an autonomous concept of EU law (paras 31–33).
    - **Meaning of 'judicial authority'.**
        - Article 6(1) EAW FD must be interpreted to mean that the term 'judicial authority' is not limited to the judges or courts of a Member State but may extend, more broadly, to the Member State authorities that administer criminal justice (para 34, with reference to *Poltorak*).

- An organ of the executive of a Member State, such as a ministry, is not covered by the term 'judicial authority' (para 35) for the following reasons.
  - The principle of separation of powers. It is generally accepted that the term 'judiciary' does not cover ministries of Member States, which fall within the province of the executive (para 36).
  - The context of the EAW FD (paras 37–39).
    - The entire surrender procedure between Member States is to be carried out under judicial supervision (with reference to *Jeremy F*).
    - The role of central authorities is limited to practical and administrative assistance for the competent judicial authorities. Member States cannot substitute the central authorities for the competent judicial authorities in relation to the decision to issue the EAW.
  - The objectives of the EAW FD (paras 25–28 and 40–45).
    - The principle of mutual recognition is founded on the premise that a judicial authority has intervened prior to the execution of the EAW for the purpose of exercising its review.
    - The issue of an arrest warrant by a non-judicial authority, such as the Lithuanian Ministry of Justice, does not provide the executing judicial authority with an assurance that the issue of that EAW has undergone the necessary judicial approval.
  - The fact that the Ministry of Justice acts only in the strict context of executing a judgment that has become legally binding – both handed down by a court following court proceedings and at the request of a court – does not call into question this interpretation (paras 46–48).
    - The Lithuanian Ministry of Justice, and not the judge who imposed the custodial sentence decision, takes the ultimate decision to issue the EAW.
    - The Lithuanian Ministry of Justice supervises observance of the necessary conditions for that issue and also enjoys discretion as regards its proportionality.
- **Meaning of 'judicial decision'.** An EAW issued by the Ministry of Justice with a view to executing a judgment imposing a custodial sentence cannot be regarded as a 'judicial decision' within the meaning of Article 1(1) EAW FD (para 48).

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

- See *supra* 3.1 (on national arrest warrant or any other enforceable judicial decision).

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

- ***Facts.*** OG is a Lithuanian national who was residing in Ireland. In 2016, a German public prosecutor's office sought his surrender pursuant to an EAW for the prosecution of a criminal offence which that public prosecutor's office identified as 'murder, grievous bodily injury'. In 2018, PI, a Romanian national, was the subject of an EAW issued by another German public prosecutor's office for the prosecution of a criminal offence identified as 'organised or armed robbery'. Both OG and PI challenged the validity of the respective EAWs on the ground that the public prosecutor's offices were not a 'judicial authority' within the meaning of Article 6(1) EAW FD. The referring Irish courts were uncertain whether the German public prosecutor's offices

met the criteria of a 'judicial authority' within the meaning of Article 6(1) EAW FD and therefore referred the cases to the CJEU.

- ***Main question.*** Does the concept of 'issuing judicial authority' include the public prosecutors' offices of a Member State, which are subordinate to a body of the executive and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue an EAW?
- ***CJEU's reply.*** **The concept of an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD does *not* include public prosecutors' offices of a Member State, which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a minister for justice, in connection with the adoption of a decision to issue an EAW.** The CJEU's main arguments follow.
  - The term 'issuing judicial authority' requires an **autonomous and uniform interpretation** (para 49, with reference to *Poltorak*, *Kovalkovas*).
  - **An authority that participates in the administration of criminal justice.**
    - The words 'judicial authority' are not limited to designating only the judges or courts of a Member State but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from ministries or police services, which are part of the executive (paras 50 and 51, with reference to *Poltorak*, *Kovalkovas*).
    - The German public prosecutor's office must be regarded as participating in the administration of criminal justice (paras 61–63).
  - **Effective judicial protection.**
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 67, with reference to *Bob-Dogi*).
    - As regards a measure, such as the issuing of an EAW, that is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 Charter, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 68).
    - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 71, with reference to *Kovalkovas*).
    - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection (para 75).
  - **An authority that is objective and independent.**
    - The 'issuing judicial authority' must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive (para 73, with reference to *Kovalkovas*).

- In the present case, it is clear that German public prosecutors' offices are required to act objectively and must investigate not only incriminating but also exculpatory evidence. Nevertheless, the fact remains that, in accordance with the German Law on the Judicial System (paras 146 and 147), the Minister for Justice has an 'external' power to issue instructions in respect of those public prosecutors' offices (para 76).
- That finding cannot be called into question by the fact that the executive has decided not to exercise the power to issue instructions in certain specific cases (para 83) or by the fact that there is legal remedy available for individuals to challenge the public prosecutor's decision to issue an EAW (paras 85–87).
- An instruction in a specific case from the Minister for Justice to the public prosecutors' offices concerning the issuing of an EAW remains permitted by the German legislation (para 87).
- As far as the German public prosecutors' offices are exposed to the risk of being influenced by the executive in their decision to issue an EAW, they do not appear to meet the requirement that they act independently in issuing such an arrest warrant. Therefore, they cannot be regarded as an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD (para 88).

Case C-509/18, *PF (Prosecutor General of Lithuania)*, Judgment of 27 May 2019.

- ***Facts.*** In 2014, the Prosecutor General of Lithuania issued an EAW for the surrender of PF, a Lithuanian national, for the prosecution of an armed robbery. PF brought an action before the competent Irish court, challenging the validity of that EAW on the ground that the Prosecutor General of Lithuania was not a 'judicial authority' within the meaning of Article 6(1) EAW FD. The referring Irish Supreme Court was uncertain whether the Prosecutor General of Lithuania met the criteria of a 'judicial authority' within the meaning of Article 6(1) EAW FD and therefore referred the case to the CJEU.
- ***Main question.*** Does the concept of 'issuing judicial authority' include the prosecutor general of a Member State, who, although institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and is independent from the executive?
- ***CJEU's reply.*** **The concept of 'issuing judicial authority' within the meaning of Article 6(1) EAW FD includes the prosecutor general of a Member State, who, although institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of an EAW.** The CJEU's main arguments follow.
  - The term 'issuing judicial authority' requires an **autonomous and uniform interpretation** (para 28, with reference to *Poltorak, Kovalkovas*).
  - **An authority that participates in the administration of criminal justice.**
    - The words 'judicial authority' are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from ministries or police services, which are part of The executive (paras 29 and 30, with reference to *Poltorak, Kovalkovas*);
    - The Prosecutor General of Lithuania must be regarded as participating in the administration of criminal justice (paras 40–42).
  - **Effective judicial protection.**
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the

judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 45, with reference to *Bob-Dogi*).

- The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 49, with reference to *Kovalkovas*).
- Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection (para 53).

- **An authority that is objective and independent.**
  - The 'issuing judicial authority' must be capable of exercising its responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive (para 51, with reference to *Kovalkovas*).
  - In addition, where the law of the issuing Member State confers the competence to issue an EAW on an authority that is not a court, the decision to issue such an arrest warrant and the proportionality of such a decision must be capable of being the subject of court proceedings that meet in full the requirements inherent in effective judicial protection (para 53).
  - In the present case, the Prosecutor General of Lithuania may be considered an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD. In addition, to participate in the administration of criminal justice the prosecutor general's legal position in that Member State safeguards not only the objectivity of the prosecutor general's role but also affords the prosecutor general a guarantee of independence from the executive in connection with the issuing of an EAW. Nevertheless, it cannot be ascertained from the information in the case file before the Court whether a decision of the Prosecutor General of Lithuania to issue an EAW may be the subject of court proceedings that meet in full the requirements inherent in effective judicial protection, which is for the referring court to determine (paras 54–56).

Case C-489/19 PPU, *NJ (Parquet de Vienne)*, Judgment of 9 October 2019.

- ***Facts.*** In 2019, an Austrian public prosecutor's office issued an EAW for the surrender of NJ for the prosecution of four acts of theft. The referring German court observed that the Austrian public prosecutor's offices are subject to directions or instructions in a specific case from the executive, in this case the Federal Minister for Justice. Accordingly, it was doubtful as to the compatibility of the procedure for issuing an EAW in Austria with the requirements arising from the judgment of 27 May 2019 (C-508/18 and C-82/19 PPU, *OG and PI (Parquets de Lübeck and Zwickau)*). In particular, the German court entertains doubts as to the status of the public prosecutor's office in Vienna as a 'judicial authority'.
- ***Main question.*** Does the fact that a public prosecutor's office is required to act on instruction preclude it from effectively issuing an EAW even in the case where that decision is subject to a comprehensive judicial review prior to the execution of the EAW?

- ***CJEU's reply.*** **The concept of a 'European arrest warrant' referred to in Article 1(1) EAW FD must be interpreted as meaning that EAWs issued by the public prosecutor's offices of a Member State fall within that concept, despite the fact that those public prosecutor's offices are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a minister for justice, in the context of the issue of those arrest warrants, provided that those arrest warrants are subject, in order to be transmitted by those public prosecutor's offices, to endorsement by a court which reviews independently and objectively, having access to the entire criminal file to which any specific directions or instructions from the executive are added, the conditions of issue and the proportionality of those arrest warrants, thus adopting an autonomous decision which gives them their final form.** The CJEU's main arguments follow.
  - The concept of 'judicial decision' is not limited to designating decisions only of the judges or courts of a Member State but must be construed as designating, more broadly, the decisions adopted by the authorities participating in the administration of criminal justice in that Member State, such as the Austrian public prosecutor's office, as distinct from ministries or police services, which are part of the executive (para 30, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy. In addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which an EAW is issued (para 34, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - The executing judicial authority may be satisfied that the decision to issue an EAW for the purpose of prosecution is based on a national procedure that is subject to review by a court and that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) EAW FD (para 36, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - The review must include an examination of the observance of the conditions necessary for the issuing of that arrest warrant and of whether it is proportionate to issue that warrant (para 37, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - The review must be exercised objectively, taking into account all incriminatory and exculpatory evidence, and independently (para 38, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - Under Austrian law, in the context of both the decision to issue a national arrest warrant and the decision to issue an EAW, the Austrian public prosecutor's offices order an arrest by means of an arrest warrant that a court must endorse. The court is to carry out a review of the conditions of the issue and its proportionality. The endorsement decision is subject to appeal before the courts (para 39).
  - The courts responsible for the endorsement of EAWs meet the requirement of objectivity and independence. However, the Austrian public prosecutor's offices cannot be regarded as satisfying that requirement (para 40).
  - Nevertheless, decisions relating to the issue of an EAW, adopted in accordance with the Austrian system, can be regarded as satisfying the minimum requirements on which their validity depends as regards the objectivity and independence of the review carried out when those decisions are adopted (para 41).
    - The decision to issue a national arrest warrant and the decision to issue an EAW must be endorsed by a court before their transmission. In the absence of endorsement of the decisions of the public prosecutor's office, arrest warrants do not produce legal effects and cannot be transmitted (para 43).

- In the context of the endorsement procedure, the court examines the conditions necessary for the issue of the arrest warrant concerned and its proportionality, taking into account the particular circumstances of each specific case (para 44).
- The court responsible for endorsing arrest warrants is not bound by the results of the investigation conducted by the public prosecutor's offices and must not be limited to the indications and grounds for the injunction set out by them and may, at any time, order additional investigations or carry them out itself (para 45).

- The endorsement systematically takes place *ex officio* before the arrest warrant produces legal effects and can be transmitted, and, therefore, such a review is distinct from a right to a remedy (para 46, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
- The court responsible for the endorsement of an EAW exercises its review independently and in full knowledge of any instructions that may have been issued in advance and adopts, at the end of that review, a decision that is independent of the decision of the public prosecutor's office, going beyond a mere confirmation of the legality of that decision (para 47).
- In those circumstances, the decision concerning the EAW in the form in which it will be transmitted must be deemed to satisfy the requirements of objectivity and independence of the review carried out at the time of the adoption of that decision (para 48).

Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and de Tours,* Judgment of 12 December 2019.

- ***Facts.*** In 2019, a French public prosecutor's office sought the surrender of JR to prosecute him for acts committed in the context of a criminal organisation. JR was arrested in Luxembourg. In another case, a French public prosecutor's office sought the surrender of YC to prosecute him for his involvement in an armed robbery. YC was arrested in the Netherlands. The Luxembourgish and Dutch courts had doubts whether the French public prosecutor's office met the criteria of a 'judicial authority' within the meaning of Article 6(1) EAW FD as interpreted in the CJEU's case-law and therefore referred the cases to the CJEU.
- ***Main questions.*** Does the concept of 'issuing judicial authority' include the public prosecutors of a Member State who are responsible for the conduct of criminal prosecutions and who act under the direction and control of their hierarchical superiors? Are the requirements of effective judicial protection met if in the issuing Member State there is a judicial review before the EAW is issued and/or judicial review is foreseen after the actual surrender of the requested person?
- ***CJEU's reply.*** **Article 6(1) EAW FD must be interpreted as meaning that the public prosecutors of a Member State, who are responsible for conducting prosecutions and act under the direction and supervision of their hierarchical superiors are covered by the term 'issuing judicial authority' if their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of an EAW. The EAW FD must be interpreted as meaning that the requirements inherent in effective judicial protection, which must be afforded to any person in respect of whom an EAW is issued in connection with criminal proceedings, are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State.** The CJEU's main arguments follow.
  - **The concept of 'issuing judicial authority'.**
    - This concept is capable of including authorities of a Member State that, although not necessarily judges or courts, participate in the administration of criminal

justice and act independently. The latter condition presupposes the existence of statutory rules and an institutional framework capable of guaranteeing that the authorities concerned are not exposed, when issuing an EAW, to any risk of being subject to directions or instructions in a specific case from the executive (para 52, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).

- The French public prosecutors participate in the administration of criminal justice (para 53).
- The French public prosecutors act objective and independently (paras 54 and 55). This independence is not called into question by the fact that they are responsible for conducting criminal prosecutions (para 57, with reference to *PF (Prosecutor General of Lithuania)*), or by the fact that the Minister for Justice may issue them with general criminal justice policy instructions (para 54), or by the fact that they are under the direction and control of their hierarchical superiors, themselves part of the public prosecutor's office and thus obliged to comply with the instructions of those hierarchical superiors (para 56, with reference to *OG and PI (Parquets de Lübeck and Zwickau)* and *PF (Prosecutor General of Lithuania)*).

- **Requirement of effective judicial protection.**
  - The requirement of effective judicial protection is not a condition for classification of the authority as an issuing judicial authority (para 48).
  - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 59, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - As regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 60, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 61, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection (para 62, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - It is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement. These procedural rules may vary from one system to another. Introducing a separate right of appeal against the decision to issue an EAW is just one possibility (paras 64–66).
  - In the present case, the French system satisfies those requirements, as French procedural rules allow for the proportionality of the decision of the public prosecutor's office to issue an EAW to be judicially reviewed before, or practically at the same time as, that decision is adopted, and also subsequently (paras 67–71).

Case C-625/19 PPU, *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, Judgment of 12 December 2019.

- ***Facts.*** In 2019, the Swedish public prosecutor issued an EAW against XD for the purpose of prosecuting him for participating in a criminal organisation committing drug-related offences. XD was arrested in the Netherlands. The Dutch court noted that, although Swedish law does not grant a right to appeal against the public prosecutor's decision to issue an EAW, its proportionality is assessed beforehand by the court adopting the national arrest warrant, as occurred in the present case. The Dutch court thus wondered whether under such circumstances the requirements of effective judicial protection as interpreted by the CJEU's case-law are nevertheless satisfied and therefore referred the case to the CJEU.
- ***Main question.*** Are the requirements of effective judicial protection met where the decision to issue an EAW for the purposes of conducting a criminal prosecution is adopted by an authority that, although participating in the administration of justice, is not a court and, prior to the decision of that authority to issue the EAW, a judge has reviewed the conditions for the issuing of that warrant and, in particular, its proportionality?
- ***CJEU's reply.*** **The EAW FD must be interpreted as meaning that the requirements inherent in effective judicial protection from which a person in respect of whom an EAW is issued for the purpose of criminal proceedings must benefit are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State.** The CJEU's main arguments follow.
  - **Requirements of effective judicial protection.**
    - The requirements of effective judicial protection are not a condition for classification of the authority as an issuing judicial authority (para 30, with reference to *Parquet général du Grand-Duché de Luxembourg and de Tours*).
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 38, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - As regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 39, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 40, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection (para 41, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - It is for the Member States to ensure that their legal orders effectively safeguard the requisite level of judicial protection by means of the procedural rules that they implement. They may vary from one system to another. Introducing a separate right of appeal against the decision to issue an EAW is just one possibility (paras 43 and 44).
    - In the present case, the Swedish system satisfies those requirements, as, even in the absence of a separate right of appeal against the public prosecutor's decision

to issue an EAW, the conditions for its issue, and in particular its proportionality, can be subject to judicial review in the issuing Member State before or practically at the same time as the decision is adopted, and also subsequently. In particular, such assessment is made in advance by the court adopting the national arrest warrant that may subsequently form the basis of the EAW, and by the court called to decide on the eventual appeal lodged by the requested person against the national decision ordering the person's preventative detention (paras 46–53).

Case C-627/19 PPU, *Openbaar Ministerie (Public Prosecutor, Brussels)*, Judgment of 12 December 2019.

- ***Facts.*** In 2019, a Belgian public prosecutor issued an EAW against ZB with a view to executing a custodial sentence of 30 months and 1 year. ZB was arrested in the Netherlands. The Dutch court, noting that Belgian law does not provide for a separate right to appeal against the public prosecutor's decision to issue an EAW, wondered whether the requirements of effective judicial protection as interpreted by the CJEU's case-law apply also with regard to an EAW issued for the purposes of executing a custodial sentence and therefore referred the case to the CJEU.
- ***Main question.*** Do the requirements of effective judicial protection mean that, where a Member State confers the competence to issue an EAW for the purposes of executing a custodial sentence to an authority that, although participating to the administration of justice, is not a court, a separate right to appeal against the decision of that authority to issue an EAW must be provided?
- ***CJEU's reply.*** **The EAW FD must be interpreted as meaning that it does not preclude legislation of a Member State which, although it confers the competence to issue an EAW for the purposes of executing a sentence on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, does not provide for the existence of a separate judicial remedy against the decision of that authority to issue such an EAW.** The CJEU's main arguments follow.
  - **Requirements of effective judicial protection.**
    - The EAW system entails a dual level of protection of procedural rights and fundamental rights, which the requested person must enjoy (para 29, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - As regards a measure, such as the issuing of an EAW, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted at at least one of the two levels of that protection (para 30, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - The second level of protection of the rights of the person concerned means that the judicial authority competent to issue an EAW must review whether the conditions necessary for the issuing of the EAW have been observed and whether the issuing of the EAW was proportionate (para 31, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
    - Where the law of the issuing Member State confers the competence to issue an EAW on an authority that, although participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection (para 32, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - **Where the EAW is issued with a view to executing a custodial sentence, the judicial review of its proportionality, which is necessary to meet the requirements of**

effective judicial protection, is carried out by the enforceable judgment on which that arrest warrant is based (para 35).

- An EAW issued with a view of executing a custodial sentence originates from an enforceable judgment that has rebutted the presumption of innocence to which the requested person is entitled following judicial proceedings that must comply with the requirements of Article 47 Charter (para 34).
- The executing judicial authority can presume that the decision to issue an EAW for the purposes of executing a custodial sentence resulted from judicial proceedings in which the requested person enjoyed all the necessary safeguards for the adoption of that decision, in particular with regard to fundamental rights (para 36).
- The proportionality of an EAW issued for the purposes of executing a custodial sentence also follows from the sentence imposed, because Article 2(1) EAW FD provides that that sentence must be a custodial sentence or a detention order made for a period of at least 4 months (para 38).

Case C-813/19 PPU, *MN*, Order of 21 January 2020.

- ***Facts.*** In France, in the context of criminal proceedings brought against several persons for aggravated theft offences. One of the accused persons claimed MN had participated in at least one of those offences. As MN was absconding, the public prosecutor's office in Aix-en-Provence issued an EAW against him, pursuant to a national arrest warrant issued by the investigating judge of Aix-en-Provence. MN was apprehended in Slovenia and was handed over to the French authorities. In the context of the French proceedings, MN challenged the validity of the EAW issued against him. He sought the annulment of that warrant and of all the acts adopted pursuant to that warrant, and requested that he be released. In support of that request, MN alleged, inter alia, that the French public prosecutor's office is not independent of the executive and therefore not an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD. He also alleged that there is no legal remedy against the decision to issue an EAW that is capable of fully satisfying the requirements inherent in effective judicial protection. The referring court considered that the clarifications provided by the CJEU in *OG and PI (Parquets de Lübeck and Zwickau)* were not sufficient to enable those pleas to be answered or to enable the court to rule on the validity of the EAW at issue in the main proceedings.
- ***Main questions.*** Does the French public prosecutor's office meet the requirements for classification as an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD? Are the requirements of effective judicial protection met?
- ***CJEU's reply.*** **Article 6(1) EAW FD must be interpreted as meaning that the concept of 'issuing judicial authority' covers French prosecutors managed and supervised by their hierarchical superiors and under the authority of the Minister of Justice in accordance with the statutory rules and institutional framework to which they are subject, as their statute grants them a guarantee of independence, in particular vis-à-vis the executive, in the context of issuing an EAW. The EAW FD must be interpreted as meaning that the requirements inherent in effective judicial protection that are to be provided to a person against whom an EAW is issued with a view to criminal prosecution are satisfied where, in accordance with the legislation of the issuing Member State, the conditions for issuing that warrant and, in particular, the proportionality thereof are subject to judicial review in that Member State.** The CJEU's main arguments are similar to those mentioned in Joined Cases C-566/19 PPU and C-626/19 PPU, *Parquet général du Grand-Duché de Luxembourg and de Tours.*

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

- ***Facts.*** In September 2017, a Belgian investigative judge issued an EAW against AZ, a Belgian national, who was accused of fraud-related offences. In December 2017, AZ was arrested in the Netherlands and surrendered to Belgium. In January 2018, the investigating judge issued an additional EAW for other offences, requesting the competent Dutch authorities to disapply the rule of speciality. In February 2018, the Dutch Public Prosecutor's Office gave his consent to extend the scope of the prosecution in accordance with the additional EAW. Subsequently, Belgian authorities prosecuted AZ in respect of the acts referred to in the initial EAW and the additional EAW and sentenced him to a 3-year prison term. AZ brought an appeal against his criminal conviction to the Belgian Court of Appeal, raising the issue of whether the Dutch Public Prosecutor may be considered to be an 'executing judicial authority' within the meaning of the EAW FD and consequently to have the power to give the consent provided for by that Framework Decision. On this issue, the Court of Appeal referred the case to the CJEU.
- ***Main questions.*** Does the concept of 'executing judicial authority' within the meaning of Article 6(2) EAW FD constitute an autonomous concept of EU law and, if so, what criteria must be applied for the purposes of determining the meaning of that concept? Must Article 6(2) and Article 27(3)(g) and 27(4) EAW FD be interpreted as meaning that the public prosecutor of a Member State constitutes an 'executing judicial authority' within the meaning of those provisions?
- ***CJEU's reply.*** **The concept of 'executing judicial authority' within the meaning of Article 6(2) EAW FD constitutes an autonomous concept of EU law. It covers the authorities of a Member State which, without necessarily being judges or courts, participate in the administration of criminal justice in that Member State, acting independently in the exercise of the responsibilities inherent in the execution of an EAW and which exercise their responsibilities under a procedure which complies with the requirements inherent in effective judicial protection. Articles 6(2), 27(3)(g) and 27(4) EAW FD must be interpreted as follows. The public prosecutor of a Member State who, although he or she participates in the administration of justice, may receive in exercising his or her decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.** The CJEU's main arguments follow.
  - The concept of 'executing judicial authority referred to in Article 6(2) EAW FD constitutes an **autonomous concept of EU law** (paras 38–41, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
  - **The status and nature of the judicial authorities referred to in Articles 6(1) and 6(2) EAW FD are identical, although they exercise separate functions.**
    - The decision on the execution of an EAW, like that on the issue of an EAW, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection, including the guarantee of independence (paras 48–50).
    - The execution of an EAW is, just as the issue of such a warrant, capable of prejudicing the liberty of the person concerned (para 51).
    - Unlike the procedure for the issue of an EAW, for which there is a dual level of protection of fundamental rights, at the stage of the execution of the EAW, the intervention of the executing judicial authority constitutes the sole level of protection provided for by the EAW FD allowing the requested person to enjoy all the guarantees appropriate to the adoption of judicial decisions (paras 52 and 53).
  - **Requirements for an 'executing judicial authority' in relation to decisions to execute EAWs or decisions to disapply the speciality rule.**

- An authority that participates in the administration of criminal justice (paras 42 and 43, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
- An authority that is objective and independent (para 44, with reference to *OG and PI (Parquets de Lübeck and Zwickau)*).
- Effective judicial protection.
  - Where the law of the executing Member State confers the competence to execute an EAW on a public prosecutor, that authority must exercise its responsibility under a procedure, which complies with the requirements inherent in effective judicial protection. This means that the decision of that authority must be capable of being subject, in that Member State, to an effective judicial remedy (paras 45 and 46, 54).
  - It is for the Member States to ensure that their legal orders effectively safeguard the level of judicial protection required by the EAW FD, as interpreted by the CJEU's case-law. They should do by means of the procedural rules which they implement and which may vary from one system to another (para 55, with reference to *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie* (*Public Prosecutors' Offices, Lyons and Tours*)).
- *Ratio legis* for applying the same regime. A decision to disapply the rule of speciality is distinct from that relating to the execution of an EAW and leads, for the person concerned, to effects distinct from those of the latter decision. However, such a decision is liable to prejudice the liberty of the person concerned since it may lead to a heavier sentence (paras 59–64).

- **Application to the case at hand.**
  - **Decision to execute an EAW.** In the Netherlands, the decision to execute the EAW lies with the court, whose status as 'judicial authority' is in no way disputed (paras 65 and 66).
  - **Decision to disapply the rule of speciality.** Under Dutch law, the public prosecutor took the decision to grant the consent in the context of the speciality rule. Since the public prosecutor may receive instructions in specific cases from the Dutch Minister for Justice, he or she does not constitute an 'executing judicial authority' (para 67). The fact that the consent given by the Public Prosecutor may be the subject of an action brought by the person concerned before a judge does not alter that conclusion (paras 68 and 69).

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

- See also *infra* 6 (on human rights scrutiny).
- ***Facts.*** In August 2015 and February 2019, Polish courts issued EAWs against two Polish nationals for the purposes of conducting a criminal prosecution and executing a custodial sentence. The persons concerned were in the Netherlands. The Dutch court had doubts as to whether it should execute these EAWs. More specifically, it raised the question of the implications of the judgment in *Minister for Justice and Equality* (*Deficiencies in the system of justice*). Because of recent developments, some of which have occurred after the issuance of the EAW in question, the Dutch court considered that the deficiencies in the Polish system of justice were such that the independence of all Polish courts and, consequently, the right of all individuals in Poland to an independent tribunal were at stake. In that context, the court was uncertain whether that finding is sufficient in itself to justify a refusal to execute an EAW issued by a Polish court, without there being any need to examine the impact of those deficiencies in the particular circumstances of the case. The court therefore referred the case to the CJEU.

- ***Main questions.*** If the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State which existed at the time of issue of that warrant or which arose after that issue, may that authority deny the status of 'issuing judicial authority' to the court which issued that arrest warrant?
- ***CJEU's reply.*** **Systematic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, which existed at the time of issue of that warrant or which arose after that issue are insufficient, on their own, to consider that all courts of that Member State fail to fall within the concept of 'issuing judicial authority'.** The CJEU's main arguments follow.
  - Mutual recognition and mutual trust are the rule (paras 35–37, with reference to *Minister for Justice and Equality* (*Deficiencies in the system of justice*)). An EAW must in principle be executed, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - The term 'judicial authority' (Article 6(1) EAW FD) requires that the authority acts independently (para 38, with reference to *OG* and *PI (Parquets de Lübeck and Zwickau)*).
  - Judicial independence forms part of the essence of the fundamental right to a fair trial and it is for each Member State that the independence of its judiciary is safeguarded (paras 39 and 40, with reference to *Minister for Justice and Equality* (*Deficiencies in the system of justice*)).
  - The existence of deficiencies does not necessarily affect every decision that the courts of that Member State adopt (para 42).
  - Denying the status of 'issuing judicial authority' to all judges or courts of that Member State would extend the limitations that may be placed on the principles of mutual recognition and mutual trust beyond exceptional circumstances (para 43). It would also mean that courts of that Member State could no longer submit references to the CJEU for preliminary rulings (para 44).
  - The CJEU's *OG* and *PI (Parquets de Lübeck and Zwickau)* case-law according to which the public prosecutors' offices of certain Member States fail, in the light of their subordinate relationship to the executive, to provide sufficient guarantees of independence to be regarded as 'issuing judicial authorities' cannot be transposed to Member States' courts (paras 45–50).

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

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

surrendered in execution of an EAW, must declare its jurisdiction to review the conditions under which that warrant was issued where an action has been brought before it to challenge its validity in light of EU law. The CJEU's main arguments follow.

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

- This is the case where, as in the present case, a court is called, in the framework of proceedings aimed at reviewing the legality of provisional detention of a person, to rule indirectly on the lawfulness of the procedure for the issuing of the EAW against that person, and in particular on the existence of a '[national] arrest warrant or any other enforceable judicial decision having the same effect', so far as this EAW has allowed the arrest of that person and the adoption of the subsequent provisional detention (para 73).

Case C-648/20 PPU, *Svishtov Regional Prosecutor's Office*, Judgment of 10 March 2021.

- See *supra* 3.1 (on national arrest warrant or any other enforceable judicial decision).

Case C-105/21, *Spetsializirana prokuratura (Informations sur la décision nationale d'arrestation)*, Judgment of 30 June 2022.

- ***Facts.*** The facts in this case are identical to those in the case giving rise to the judgment of 28 January 2021 in Case C-649/19 (*Spetsializirana prokuratura (Déclaration des droits)*) (see *supra* 1 (on the validity of the EAW FD).
- ***Main questions.*** Must Articles 6 and 47 Charter, the rights to freedom of movement and residence, and the principles of equality and mutual trust be interpreted as meaning that they oblige an issuing judicial authority to forward to the person who is the subject of an arrest warrant the national decision on the arrest and information on the possibilities of challenging that decision before surrender to the issuing Member State? Must the principle of the primacy of EU law be interpreted as meaning that, in order to ensure compliance with the EAW FD, the issuing judicial authority is required to not forward to the requested person the national decision on his or her arrest and information on the possibilities of challenging that decision, even though its national law requires it to do so?
- ***CJEU's reply.*** **Articles 6 and 47 Charter, the right to freedom of movement and residence, and the principles of equality and mutual trust must be interpreted as meaning that a judicial authority, when issuing an EAW, is under no obligation to forward to the person who is the subject of that arrest warrant the national decision on the arrest and information on the possibilities of challenging that decision while that person is still in the executing Member State and has not been surrendered. The EAW FD precludes national law from requiring the issuing judicial authority to forward to the requested person, before his or her surrender, the national decision on his or her arrest and information on the possibilities of challenging that decision. The principle of the primacy of EU law requires the issuing judicial authority to interpret, as far as possible, its national law in a way that is in conformity with EU law, which enables it to ensure an outcome that is compatible with the aim pursued by the EAW FD.** The CJEU's main arguments follow.
  - Articles 6 and 47 Charter, the right to freedom of movement and residence, and the principles of equality and mutual trust do not require the forwarding of the national decision on the arrest and information on ways of challenging that decision to the requested person before his or her surrender.
    - The right to effective judicial protection does not require that the right to challenge the decision to issue an EAW can be exercised before the surrender (paras 44–45, with reference to *Spetsializirana prokuratura (Déclaration des droits)*).
    - The requested person's right to information is protected, as (i) the EAW incorporates the information provided for in Article 8 EAW FD and (ii) the accused person receives the information on the remedies in the issuing Member

State and is given access to the materials of the case, in accordance with Directive 2012/13, as soon as he or she is surrendered (para 46).

- It follows from settled case-law that the EAW system entails a dual level of protection of the fundamental and procedural rights of the requested person. Articles 6 and 47 Charter in no way require that a third level of judicial protection be afforded to the requested person, such as that envisaged by the referring court (paras 49–53, with reference to *Bob-Dogi*; *OG and PI (Parquets de Lübeck and Zwickau)*; and *Spetsializirana prokuratura (Déclaration des droits)*).
- Article 6 Charter and Article 5 ECHR have the same meaning and scope. The EAW mechanism corresponds to the situation referred to in Article 5(1)(f) ECHR. The information that must necessarily accompany an EAW makes it possible, when the accused person is arrested in the Member State executing that warrant, to provide that person with the information necessary to meet the requirements arising from Article 5 ECHR (paras 54–59).
- The right to freedom of movement and residence does not require the forwarding of the abovementioned information. An accused person subject to an EAW who is in a Member State different from the Member State in which he or she has allegedly committed a criminal offence is not in the same situation as an accused person who has remained in the Member State where the offence was committed. Only once the former person has been surrendered can the two situations be considered comparable (para 64).
- The principle of equivalence applies only when the person arrested on the basis of an EAW is surrendered (para 65).
- The fact that the EAW FD does not require the national decision on which the EAW is based to be forwarded is an expression of the principle of mutual trust (para 67).

- The EAW FD precludes national law from requiring the issuing judicial authority to forward to the requested person, before his or her surrender, the national decision on his or her arrest and information on the possibilities of challenging that decision.
  - The EAW FD established a simplified and more efficient system of surrender. The annex to the EAW FD provides a specific form that the issuing judicial authorities are required to complete, supplying the specific information requested. The purpose of that information is to provide the minimum official information required under Article 8 EAW FD to enable the executing judicial authorities to quickly give effect to the EAW by adopting their decision on the surrender as a matter of urgency (paras 75–76, with reference to *Piotrowski*).
  - The objective of speeding up and simplifying the surrender procedure between Member States, as pursued by the EAW FD, would be compromised if the issuing judicial authority were required to forward to the person the abovementioned information. It would hinder the executing judicial authority's implementation of the simplified system of surrender (para 78).
  - The principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States and therefore requires all Member States' bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those states (para 81, with reference to *Popławski II*).
  - Although the EAW FD does not have direct effect under the EU Treaty itself, its binding character places an obligation on national authorities to interpret national law in conformity with EU law from the date of expiry of the transposition period of that framework decision. Although the principle of conforming interpretation cannot serve as the basis for an interpretation of the

domestic law of a Member State *contra legem*, it nevertheless requires that the whole body of that domestic law be taken into consideration and that the interpretative methods recognised by domestic law be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the decision's objective (paras 82–83, with reference to *Popławski II*).

Case C-492/22 PPU, *Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)*, Judgment of 8 December 2022.

- See also *infra* 11 (on postponed surrender).
- ***Facts.*** A Polish court issued an EAW against CJ, a Polish national, for executing a 2-year custodial sentence, imposed on him in Poland. The executing Dutch court placed the requested person in detention and authorised his surrender to Poland. CJ was, however, also the subject of an ongoing criminal prosecution in the Netherlands concerning acts that were unrelated to the Polish EAW. CJ did not wish to waive his right to be present at the hearing in the ongoing Dutch criminal proceedings. The Dutch public prosecutor stated that he wished to order the postponement of CJ's surrender and to request that the court periodically extend CJ's detention for as long as the Dutch criminal proceedings were ongoing. The referring court had several questions and referred the case to the CJEU.
- ***Main question.*** Does a decision to postpone the surrender constitute a 'decision on the execution of an EAW' which must be taken by the executing judicial authority? If such a decision has been adopted by an entity other than the executing judicial authority, may the person who is the subject of the EAW still be kept in detention for the purpose of executing that warrant?
- ***CJEU's reply.*** **Article 24(1) EAW FD must be interpreted as meaning that the decision to postpone the surrender referred to in that provision constitutes a decision on the execution of an EAW which under Article 6(2) EAW FD must be taken by the executing judicial authority. Where such a decision has not been taken by that authority and the time limits referred to in Article 23(2) to (4) EAW FD have expired, the person who is the subject of the EAW must be released, in accordance with Article 23(5) EAW FD.** The CJEU's main arguments follow.
  - **A decision to postpone surrender falls within the exclusive competence of the executing judicial authority.**
    - Article 24(1) EAW FD clearly indicates that it is for the 'executing judicial authority' to postpone the surrender of the requested person (para 51).
    - The Public Prosecutor for the Amsterdam District does not fall within that concept, since that authority may be subject to individual instructions from the Netherlands Minister for Justice (para 55, with reference to *Openbaar Ministerie (Forgery of documents)*).
    - It seems that the decision to postpone the surrender at issue in the main proceedings was not adopted by an 'executing judicial authority', which it is for the referring court to determine (para 55).
  - **Implications of a potential finding of unlawfulness of a decision to postpone the surrender.**
    - Where the decision to postpone the surrender has not been taken by an 'executing judicial authority', it must be held that, once the final decision on the execution of the EAW has been validly adopted, Article 23(5) EAW FD requires the competent authority of the executing Member State to release the requested person, without prejudice to the application of the measures that that authority deems necessary under Article 12 EAW FD to prevent that person from absconding (paras 58-60).
    - It cannot be ruled out that the referring court may interpret the provisions of its national law in a manner consistent with the requirements of Article 24(1) EAW FD

and substitute its own postponement decision for that adopted by the Public Prosecutor for the Amsterdam District which it has previously found to be unlawful, if necessary by providing for the requested person to remain in detention (para 62).

- If it is not possible to give such an interpretation, it follows from Article 23(5) EAW FD that the referring court will be required to order the release of the requested person, should it find that the time limits laid down in Article 23(2) to (4) have been exceeded (para 64).

Case C- 158/21, *Puig Gordi and Others*, Judgment of 31 January 2023.

- See also *supra* 2 (on the admissibility of a request for preliminary ruling by an issuing judicial authority), *infra* 4 (on the possibility to issue several successive EAWs and obligation to decide on the execution of the EAW), *infra* 6 (on human rights scrutiny) and *infra* 10 (on requests for additional information).
- ***Facts.*** See *infra* 6 (on human rights scrutiny).
- ***Main question.*** May the executing judicial authority verify whether an EAW has been issued by a judicial authority which was competent for that purpose and refuse to execute that EAW where it considers that that is not the case?
- ***CJEU's reply.*** **Article 1(1) and (2) and Article 6(1) EAW FD must be interpreted as meaning that the executing judicial authority may not verify whether an EAW has been issued by a judicial authority which had competence for that purpose and refuse to execute that EAW where it considers that that is not the case.** The CJEU's main arguments follow.
  - It follows from Article 1(1) and (2) EAW FD that only EAWs issued by a judicial authority, within the meaning of Article 6(1) EAW FD, are to be executed (para 82).
  - The concept of 'judicial authority' requires an autonomous and uniform interpretation (para 84, with reference to *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)* and *Openbaar Ministerie (Independence of the issuing judicial authority)*).
  - It is for the executing judicial authority to ensure, before executing an EAW, that it has indeed been issued by a judicial authority within the meaning of Article 6(1) EAW FD. However, the executing judicial authority cannot verify, under that provision, that the issuing judicial authority has, in the light of the legal rules of the issuing Member State, competence to issue an EAW (para 85).
  - The EU legislature entrusted each Member State with the designation, within the framework of its procedural autonomy, of the judicial authorities competent to issue an EAW (para 86, with reference to *Kovalkovas, OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*). Since that designation thus derives exclusively, on account of that choice made by the EU legislature, from the law of each Member State, it is for the judicial authorities of the issuing Member State to assess, within the context defined in Article 6(1) EAW FD and, where appropriate, subject to review by higher national courts, their jurisdiction, under the law of that Member State, to issue an EAW (para 87).
  - As the Advocate General observed in point 74 of his Opinion, to consider that the assessment of its own jurisdiction by the issuing judicial authority may subsequently be reviewed by the executing judicial authority would amount to conferring on the latter authority a general function of reviewing the procedural decisions adopted in the issuing Member State, which would run counter to the principle of mutual recognition (para 88).

4. Possibility to issue several successive EAWs and obligation to decide on their execution

The CJEU held 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 or in another Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts (*AY (Mandat d'arrêt – Témoin); Breian*). The CJEU ruled that an executing authority is not entitled to refuse the execution solely on the grounds that another Member State party has refused to execute a first arrest warrant issued against the same person and for the same acts (*Breian*). So, the executing authority is still under an obligation to examine the request for surrender and to take a decision on the execution of the new arrest warrant. The executing authority must give due consideration to the reasons underlying that previous decision, within the framework of its own examination of the existence of a ground for non-execution (*Breian*). This applies not only in the context of the EAW FD, but also in the context of the Agreement on the surrender procedure between the EU Member States and Norway and Iceland[2] (*Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)*).

The CJEU also confirmed, from the issuing perspective, that an issuing judicial authority can issue several successive EAWs for a requested person with a view to obtaining his or her surrender by a Member State after the execution of a first EAW concerning that person has been refused by that State. However, the execution of a new EAW must not result in an infringement of the fundamental rights of that person, and the issuing of the new EAW must be proportionate (*Puig Gordi and Others*). These conditions apply also to the Agreement on the surrender procedure between the EU Member States and Norway and Iceland (*Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)*).

Case C-268/17, *AY (Mandat d'arrêt – Témoin)*, Judgment of 25 July 2018.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling by an issuing judicial authority) and *infra* 7.3 (on *ne bis in idem*).
- ***Facts.*** See *supra* 1.
- ***Main question.*** Must Article 1(2) EAW FD be interpreted as requiring the executing judicial authority to adopt a decision on any EAW forwarded to it, including when, in that Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts, but the second EAW has been issued only on account of the indictment, in the issuing Member State, of the requested person?
- ***CJEU's reply.*** **Article 1(2) EAW FD must be interpreted to mean that, in such a scenario, the executing judicial authority is required to adopt a decision on any EAW forwarded to it.** The CJEU's main arguments follow.
  - **The wording of Article 1(2) EAW FD.** Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by the framework decision, and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein (para 33).

[2] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, Official Journal L-292, 21.10.2006, p. 2-19.

- **Articles 15, 17 and 22 EAW FD.** An executing judicial authority that does not reply following the issue of an EAW and thus does not communicate any decision to the judicial authority that issued the EAW is in breach of its obligations under those provisions (paras 34 and 35).

Case C-158/21, *Puig Gordi and Others*, Judgment of 31 January 2023.

- See also *supra* 2 (on the admissibility of a request for preliminary ruling by an issuing judicial authority), *supra* 3.3 (on judicial authority, judicial decisions and effective judicial protection), *infra* 6 (on human rights scrutiny) and 10 (on requests for additional information).
- ***Facts.*** See *supra* 6 (on human rights scrutiny).
- ***Main question.*** May an issuing judicial authority issue several successive EAWs against a requested person with a view to obtaining his or her surrender by an executing Member State after the execution of a first EAW concerning that person has been refused by that Member State?
- ***CJEU's reply.*** **The EAW FD does not preclude the issuing of several successive EAWs against a requested person with a view to obtaining his or her surrender by a Member State after the execution of a first EAW concerning that person has been refused by that Member State, provided that the execution of a new EAW does not result in an infringement of Article 1(3) EAW FD and provided that the issuing of the latter EAW is proportionate.** The CJEU's main arguments follow.
  - No provision of the EAW FD excludes the issuing of several successive EAWs against a person (para 140).
  - The issuing of a new EAW may prove necessary, in particular after the factors which prevented the execution of a previous EAW have been ruled out or if the decision refusing to execute that EAW was not consistent with EU law (para 141).
  - However, there are two limits to the issuing of a new EAW.
    - **Change of circumstances.** The issuing of an EAW the execution of which would lead to an infringement of Article 47 Charter and should, in the circumstances set out in the Court's settled case-law, be refused by the executing judicial authority is not compatible with the principles of mutual trust and sincere cooperation (para 142, with reference to *Gavanozov II*). Therefore, an issuing judicial authority cannot, in the absence of a change in circumstances, issue a new EAW against a person after an executing judicial authority has refused to give effect to a previous EAW issued against that person, in accordance with the requirements that were imposed on it by Article 1(3) EAW FD, read in conjunction with Article 47(2) Charter (para 143).
    - **Proportionality.** The issuing judicial authority must assess whether it is, in the light of the particular circumstances of the case, proportionate to issue that new EAW. In this context, they must take into account the nature and gravity of the offence for which the requested person is being prosecuted, the consequences for that person of the EAWs previously issued against him or her, or the prospects of execution of any new EAW (paras 144–145, with reference to *PF (Prosecutor General of Lithuania)* and *MM*).

Case C-71/21, *Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)*, Judgment of 14 September 2023.

- See also *infra* 6 (on human rights scrutiny) and *infra* 7 (on refusal grounds).
- ***Facts.*** KT, who resided in Bulgaria with his children, was the subject of criminal proceedings in Norway for fraud-related offences. In July 2018, Norway issued an arrest warrant (AW) against KT, which was circulated by the Schengen Information System (SIS). In November 2019, KT was arrested in Poland, on the basis of the SIS alert. In January 2020, a Polish court refused the

execution of that AW on the basis of Article 1(3) of the Agreement on the surrender procedure between the EU, Norway and Iceland ('Surrender Agreement'). The court considered that the surrender of KT to Norway would entail a breach of Article 8 of the ECHR. According to that court, such a surrender would result in the children being taken into the care of a foster family and the permanent severance of the relationship with their father. That court also considered that the Norwegian authorities could use other forms of judicial cooperation in criminal matters with Bulgaria in the context of the criminal proceedings at issue. In February 2020, a Polish court of appeal dismissed KT's appeal. In March 2020, KT was arrested in Bulgaria, again on the basis of the SIS alert. In March 2020, Norway issued a new AW against KT in the context of the same criminal proceedings and based on the same grounds as those on the basis of which the initial AW had been issued. The Bulgarian court, which was requested to execute that AW, referred the case to the CJEU.

- ***Main questions.*** Does the Surrender Agreement allow the issuing of a new AW for the purposes of criminal prosecution in the same case against a person whose surrender has been refused by a Member State of the EU? Is a Member State, to which an AW is addressed, allowed to rule again in the case in which another Member State refused to surrender the same person for the purposes of the same criminal proceedings?
- ***CJEU's reply.*** **Article 1(3) of the Surrender Agreement must be interpreted as not precluding the issuing of several successive AWs against a requested person with a view to obtaining his or her surrender by a State party to that Agreement after the execution of a first arrest warrant concerning that person has been refused by another State party to that agreement, provided that the execution of a new arrest warrant does not result in an infringement of that provision and provided that the issuing of that latter arrest warrant is proportionate. The Surrender Agreement must be interpreted as precluding the execution of an AW by one State party from being refused solely on the ground that another State party has refused to execute a first arrest warrant issued by Norway against the same person and for the same acts.** The CJEU's main arguments follow.
  - **Possibility to issue several successive AWs against the same person.**
    - The provisions of the Surrender Agreement are very similar to the provisions of the EAW FD (para 30, with reference to *Ruska Federacija*).
    - The text of the Surrender Agreement does not prohibit the issuing of several successive AWs against a person (para 31).
    - The aim of the Surrender Agreement is to expedite judicial cooperation in criminal matters. A systematic prohibition to issue a new AW in the event of a refusal to execute a first AW by another State party would undermine the effectiveness of the surrender system and would entail a risk of impunity (paras 32–35).
    - The issuing of a new AW may prove necessary, in particular after the factors which prevented the execution of a previous AW have been ruled out or where the decision refusing to execute that AW was not consistent with the Surrender Agreement (para 36, with reference to *Puig Gordi and Others*).
    - However, there are two limits to the issuing of a new AW.
      - **Change of circumstances.** An issuing judicial authority cannot, in the absence of a change in circumstances, issue a new AW against a person after an executing judicial authority has refused to give effect to a previous AW issued against that person, in accordance with the requirements that were imposed on it by Article 1(3) Surrender Agreement (paras 39–40, with reference to *Puig Gordi and Others*).
      - **Proportionality.** The issuing judicial authority must assess whether it is, in the light of the particular circumstances of the case, proportionate to issue that new AW. In this context, they must take into account the

nature and gravity of the offence for which the requested person is being prosecuted, the consequences for that person of the AW(s) previously issued against him or her, or the prospects of execution of any new AW (paras 41–42, with reference to *Puig Gordi and Others*).

- **Obligation to execute successive AWs against the same person.**
  - The Surrender Agreement does not contain a provision equivalent to Article 1(2) EAW FD relating to the obligation to execute EAWs (para 45), yet the objectives and the structure of both instruments are quite similar (paras 46–47).
  - Parties to the Surrender Agreement are, in principle, required to act upon an AW and may refuse to execute it only for reasons arising from this Agreement (para 48). The existence of a risk of infringement of a fundamental right is capable of permitting the executing judicial authority to refrain from giving effect to an AW based on Article 1(3) Surrender Agreement (paras 49–50, with reference to *E.D.L. (Grounds for refusal based on illness)*).
  - There is no provision in the Surrender Agreement which provides for the possibility of refusing the execution of an AW when the execution of a first AW concerning the same person and the same acts was refused by a State party to the Agreement (para 51).
  - The decision of an executing authority to refuse the execution of an AW cannot be assimilated to having been 'finally judged' within the meaning of Article 4(2) of that Agreement. The examination of a request for surrender does not imply the initiation of criminal proceedings by the executing State against the requested person and does not involve an assessment of the merits of the case (paras 52–54, with reference to *Mantello*).
  - A previous decision to refuse an AW by an executing authority of a Member State on the basis of Article 1(3) Surrender Agreement must encourage vigilance from the executing authority of another Member State to which a new AW for the same person and the same acts has been issued. Yet that executing authority is still under an obligation to examine the request for surrender and to take a decision on the execution of the new AW (para 55).

Case C-318/24 PPU, *Breian*, Judgment of 29 July 2024.

- See also *supra* 2 (on the admissibility of a request for preliminary ruling by an issuing judicial authority) and *infra* 6 (on human rights scrutiny) and 10 (on requests for additional information).
- ***Facts.*** See *infra* 6 (on human rights scrutiny).
- ***Main questions.*** Does the final decision of an executing judicial authority to refuse to surrender a requested person have the authority of *res judicata* with regard to another executing judicial authority of another Member State? Can the issuing judicial authority send a new request for the surrender of a requested person on the basis of the same EAW where the issuing judicial authority itself finds that the earlier decision to refuse to execute the EAW was not consistent with EU law?
- ***The CJEU's reply.*** **The executing judicial authority is not obliged to refuse to execute an EAW where the executing authority of another Member State has previously refused to execute that arrest warrant. Nevertheless, within the framework of its own examination, that authority must give due consideration to the reasons underlying that refusal decision. The issuing judicial authority can maintain the EAW, provided that, according to its own assessment, execution of that arrest warrant should not be refused and that it is proportionate to maintain that warrant.** The CJEU's main arguments follow.

- **An executing authority is not bound by the decision made by an executing authority of another Member State to not execute an EAW on fundamental-rights-related grounds, but must give due consideration to the reasons underlying such a decision.**
  - No provision of the EAW FD provides for the possibility, or obligation, for an executing authority of a Member State to refuse to execute an EAW solely on the grounds that the executing authority of another Member State has refused to execute it, without examining itself whether there are any grounds for the non-execution of that EAW (para 39, with reference to *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*).
  - Even where the decision of an executing authority of a Member State to refuse the execution of an arrest warrant has the authority of *res judicata* under national law, it cannot be assimilated to having been 'finally judged' within the meaning of Article 3(2) EAW FD (paras 40-42, with reference to *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*).
  - An executing authority cannot refuse to execute an EAW solely on the grounds that the executing authority of another Member State has refused to execute it, without examining itself whether there are any grounds for non-execution (para 43, with reference to *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*).
  - The principle of mutual recognition does not extend to decisions not to execute EAWs (para 44). However, in accordance with the principle of mutual trust, the executing authority of a Member State to which a new request for surrender of the person concerned is made must give due consideration to the reasons underlying that previous decision, within the framework of its own examination (para 46, with reference to *Bundesrepublik Deutschland (Effect of a decision granting refugee status)*, C-753/22).
- **An issuing authority whose EAW was not executed by the executing authority on fundamental-rights-related grounds is not per se obliged to withdraw it.**
  - Nothing in the EAW FD prevents the issuing authority from maintaining the request for surrender under an EAW where the executing authority of a Member State has refused to execute that arrest warrant (para 48). However, the executing authority must exercise vigilance (para 49, with reference to *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*).
  - It may prove necessary for the judicial authority issuing an EAW to maintain it, in particular after the factors which led to the previous request for surrender have been ruled out, where the decision refusing to execute that EAW was not consistent with EU law or where there was a change in circumstances (paras 51-53, with reference to *Puig Gordi and Others*).
  - It is for the issuing judicial authority to examine whether, in the light of the particular circumstances of the case, it is proportionate to maintain the EAW. In the context of such an examination, it is for that authority, inter alia, to take into account the nature and gravity of the offence for which the requested person is being prosecuted, the consequences for that person of the maintenance of that EAW issued against him or her and the prospects of execution of that EAW (para 54, with reference to *Puig Gordi and Others*).

5. Scope of the EAW

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

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

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

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

- ***Facts.*** The referring Dutch court was requested to execute an EAW issued by a Belgian public prosecutor seeking the arrest and surrender of A for the execution of a custodial sentence of 5 years for 'the intentional assault and battery of a spouse causing incapacity for work' and 'the carrying of a prohibited weapon'. The referring court agreed in principle with the surrender for the first act but had doubts with regard to the execution of the EAW in respect of 'the carrying of a prohibited weapon', which under Dutch law is punishable only by a third-category fine. According to the Dutch EAW law, the acts alleged against the requested person must be subject to criminal sanctions in both Member States concerned **and** the maximum custodial sentence applicable to such acts must be at least 12 months in **both** Member States. The referring judge wonders whether a refusal based on such an interpretation is in accordance with Article 2(4) and Article 4(1) EAW FD.
- ***Main question.*** Do Articles 2(4) and 4(1) EAW FD permit the executing Member State to transpose those provisions into its national law in such a manner as to require that the act should be punishable under its law **and** that, under its law, a custodial sentence of a maximum period of at least 12 months is laid down for that act?
- ***The CJEU's reply.*** **Articles 2(4) and 4(1) EAW FD do not permit an interpretation whereby the surrender is also made subject to the condition that the act is under the law of that executing Member State punishable by a custodial sentence of a maximum of at least 12 months.** The CJEU's main arguments follow.
  - **The wording of Article 4(1) EAW FD.** The option to refuse execution under Article 4(1) EAW FD is limited to a situation in which an EAW relates to an act that is not included on the list in Article 2(2) EAW FD and does not constitute an offence under the law of the executing Member State (paras 24 and 25).
  - **The wording of other provisions of the EAW FD.** Neither Articles 2(4) and 4(1) EAW FD nor any other provisions thereof provide for the possibility of opposing the execution of an EAW concerning an act that, constituting an offence in the executing Member State, is not there punishable by a custodial sentence of a maximum of at least 12 months (para 27).
  - **General background and objectives of the EAW FD.** The general background of the EAW FD and the objectives that it pursues also confirm this finding (para 28).
  - **Issuing Member State's law is the frame of reference.** As is clear from Article 2 EAW FD (paras 1 and 2), the EAW FD focuses, with regard to offences in respect of which an EAW may be issued, on the level of punishment applicable in the issuing Member State. The reason for this is that criminal prosecutions or the execution of a custodial sentence or detention order for which such a warrant is issued are conducted in accordance with the rules of that Member State (para 29).

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

Case C-717/18, *X (European arrest warrant – Double criminality)*, Judgment of 3 March 2020.

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

accordance with the form contained in Annex A. Under Section (c) point 2 of that form, the issuing judicial authority must provide information on the 'length of the custodial sentence or detention order imposed'. It follows from the very wording of Section (c) of that form and the term 'imposed' that the sentence is the one resulting from the version of the law of the issuing Member State which is applicable to the facts in question (paras 28–32).

- **The purpose of the EAW FD.** The EAW FD seeks to establish a simplified and more effective system for the surrender of convicted or suspected persons. If the law of the issuing Member State which the executing authority must take into account pursuant to Article 2(2) EAW FD was not the one applicable to the facts giving rise to the case in which the EAW was issued, the executing authority would be required to verify whether that law had not been amended subsequent to the date of those facts. This interpretation would run counter the purpose of EAW FD and, in view of the difficulties the executing authority might encounter in identifying the relevant versions of the law, it would be a source of uncertainty and be contrary to the principle of legal certainty (paras 35–38).
- **The executing judicial authority cannot simply refuse to execute the EAW but must assess the dual criminality.** The fact that the offence at issue cannot give rise to surrender without verification of double criminality pursuant to Article 2(2) EAW FD does not necessarily mean that the execution of the EAW has to be refused. The executing authority is under obligation to examine the criterion of double criminality in the light of that offence (paras 41 and 42).

6. Human rights scrutiny

In its case-law, the CJEU explained the impact that human rights can have in the context of the execution of an EAW. In a first set of judgments, the CJEU ruled on the right to be heard (*Radu*) and on the right to be present at trial in the context of *in absentia* judgments (*Melloni*), concluding that, under the specific circumstances of the cases at hand, the execution of an EAW could not be refused on human rights grounds. In later judgments, the CJEU explicitly held that, in **exceptional circumstances**, an executing judicial authority must refrain from giving effect to an EAW if it finds that there exists, for the individual in respect of whom the EAW has been issued, a real risk of inhuman or degrading treatment on account of the conditions of detention (*Aranyosi and Căldăraru; ML* (*Conditions of detention in Hungary*); *Dorobantu; Breian*) or on account of serious, chronic and potentially irreversible illnesses of the requested person (*E.D.L. (Motif de refus fondé sur la maladie)*). The same applies if it finds that there is a real risk of breach of the fundamental right to a fair trial (*Minister for Justice and Equality (Deficiencies in the System of Justice)*; *Openbaar Ministerie* (*Indépendance de l'autorité judiciaire d'émission)*) and/or the right to a tribunal 'previously established by law' (*Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*; *Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II); Puig Gordi and Others; Breian*) or the respect for private and family life and the rights of the child (*GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*).

Two-step assessment. In its case-law, the CJEU developed the two-step examination that the executing judicial authority is required to perform before taking a decision on the execution of the EAW. The CJEU has held that both steps of the examination must be assessed and that a refusal to execute an EAW requires that both steps be met (*Puig Gordi and Others;* (*GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*). Consequently, a finding by the executing judicial authority that there are factors demonstrating systemic or generalised deficiencies cannot justify that judicial authority's refusal to execute an EAW without having found a real risk under the second step of the examination. Likewise, an executing judicial authority cannot refuse to execute an EAW based on the grounds alleged by the requested person that he/she will be exposed to a risk of infringement of one of their fundamental rights if that executing authority considers that it does not have at its disposal information demonstrating the existence of systemic or generalised deficiencies in that Member State. However, this 'two-step assessment' does not apply in the case of serious, chronic and potentially irreversible illnesses of the requested person (*E.D.L. (Motif de refus fondé sur la maladie)*, see *infra* Section 11).

First step. Systemic or generalised deficiencies or deficiencies affecting an objectively identifiable group of persons to which the requested person belongs.

Under the first step, the executing judicial authority must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach, in the issuing Member State, of the fundamental right at issue, on account of systemic or generalised deficiencies so far as concerns e.g. prison conditions (in the case of Article 4 Charter) or a tribunal established by law (in the case of Article 47(2) Charter). This information may be obtained from, for example, judgments of international courts, such as judgments from the ECtHR, judgments of courts of the issuing Member State and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. For instance, a report of a UN

Working Group on Arbitrary Detention is one of the factors to consider, but the executing judicial authority is not bound by the conclusions set out in such a report (*Puig Gordi and Others*).

In relation to the fundamental right to a tribunal established by law, in particular questions on the jurisdiction of the trial court, the CJEU clarified that legal remedies in the issuing Member State, which enable a review of the jurisdiction of the court called upon to try a person after surrender, may rule out the risk of a breach (*Puig Gordi and Others*).

Second step. Specific and precise analysis of the individual situation of the requested person.

Under the second step, the executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact on the case at hand, that is whether there are substantial grounds for believing that, the requested person, if surrendered, will run a 'real risk' of violation of his or her rights.

In relation to **prison conditions** (*Aranyosi and Căldăraru; ML* (*Conditions of detention in Hungary*); *Dorobantu*), the CJEU held that the executing judicial authority must determine, specifically and precisely, that there are substantial grounds for believing that, following the requested person's surrender to the issuing Member State, he or she will run a 'real risk' of being subject in that Member State to inhuman or degrading treatment. It must rely on objective, reliable, specific and properly updated information. It must make an overall assessment of all the relevant physical aspects of the detention, e.g. the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within that prison. In the absence of EU minimum rules on detention conditions, the executing authority must take account of the criteria laid down in the ECtHR's case-law (e.g. *Muršić* v *Croatia*). The assessment should not be limited to obvious inadequacies only. The assessment must concern only the conditions in the detention centre in which the executing Member State will detain the requested person. The necessary supplementary information that the executing authorities may ask for from the issuing authorities (Article 15 EAW FD) plays an important role in the assessment. The CJEU recalled the possibility (and limits) for requesting necessary supplementary information pursuant to Article 15 EAW FD (see also *infra* 9) and underlined that, in principle, this should be done within the time limits of Article 17 EAW FD (see also *infra* Section 8). If the issuing judicial authority gives or endorses an assurance 'that the requested person will not suffer inhuman or degrading treatment', the executing authority shall rely on this assurance, unless there are specific indications that the detention conditions in a particular detention centre are in breach of Article 4 Charter. Assurances should be drafted in a sufficiently clear way, but it is not necessary to use a particular phrase or term (*Breian*).

In relation to the **fundamental right to a tribunal established by law**, in particular questions on an independent tribunal, the CJEU clarified what type of information the executing court should consider when making its assessment, distinguishing between EAWs issued for the purpose of prosecution and EAWs issued for the purpose of executing a custodial sentence (*Minister for Justice and Equality* (*Deficiencies in the System of Justice*); *Openbaar Ministerie* (*Indépendance de l'autorité judiciaire d'émission*); *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*; *Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)*).

For 'prosecution' EAWs, the executing judicial authority must assess the information provided by the requested person relating to his or her personal situation, the nature of the offence for which that person is prosecuted, the factual context surrounding that EAW, or any other circumstance

relevant to the assessment of the independence and impartiality of the panel of judges likely to be called upon to hear the proceedings in respect of that person. For 'execution' EAWs, the executing judicial authority must rely on information provided by the requested person relating to the composition of the panel of judges who heard his or her criminal case, or any other circumstance relevant to the assessment of the independence and impartiality of that panel. An executing judicial authority cannot refuse to execute an EAW on the grounds that the record of the oath taken by one of the judges who imposed that sentence cannot be found, or that another judge of the same formation has taken an oath only as a public prosecutor (*Breian*).

Higher national standards. The CJEU noted in its case-law that Member States are entitled to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 Charter and Article 3 ECHR, as interpreted by the ECtHR. However, in the context of the application of the EAW FD, a Member State may make the surrender to the issuing Member State of the person concerned by an EAW subject only to compliance with the latter requirements and not with those resulting from its own national law (*Dorobantu; Breian*). A judicial authority may only apply a national provision which provides that the execution of an EAW is to be refused where that execution would lead to an infringement of a fundamental right enshrined in EU law, if the scope of that provision does not go beyond the scope of Article 1(3) EAW FD as interpreted by the Court (*Puig Gordi and Others; GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*). Similarly, in the context of *in absentia* judgments, the CJEU stated that, whenever the EU legislature adopted uniform standards of fundamental rights protection (exhaustive harmonisation), national courts cannot make the surrender conditional on the fulfilment of additional national requirements which are not foreseen in that EU legislation (*Melloni*).

Alignment between the case-law of the CJEU and the ECtHR. A wrong assessment of the factual basis will not only lead to a breach of EU law, but can also lead to a conviction of the executing Member State by the ECtHR. The ECtHR convicted an executing Member State that – in front of a sufficiently solid factual basis to establish the existence of a real risk of inhuman or degrading treatment because of detention conditions in the issuing State – had decided to execute the EAW and had surrendered the requested person (*Moldovan v France*).[3] Yet in another case, the ECtHR, arguing that there was a lack of sufficient factual basis for a refusal, did not refrain from convicting an executing Member State, which had refused to execute an EAW, holding a violation of Article 2 ECHR (*Castaño v Belgium*).[4] The interaction and dialogue between both European Courts is undeniable. Throughout its case-law, the CJEU has repeatedly referred to the relevant ECtHR case-law, clearly acknowledging that the acquis of the ECtHR is essential for interpreting the corresponding rights of the Charter. But also the ECtHR, from its side, has acknowledged the importance of the principles of mutual trust and mutual recognition within the EU legal order which should prevail except when there is a serious and substantiated complaint that the protection of a Convention right has been manifestly deficient (*Pirozzi*, paras 63–64; *Bivolaru and Moldovan v France*, paras 100–102).[5]

[3] BIVOLARU ET MOLDOVAN c FRANCE (coe.int).
[4] ROMEO CASTAÑO v BELGIUM (coe.int).
[5] PIROZZI v BELGIUM (coe.int); BIVOLARU ET MOLDOVAN c FRANCE (coe.int). For an overview of ECHR cases in which the execution or refusal of an EAW raised issues under different provisions of the ECHR, see the *Guide on the case-law of the European Court of Human Rights: European Union law in the Court's case-law* (updated on 29 February 2024), which can be

Assessment of a new arrest warrant in case of a previous refusal. Finally, it is important to note that, in the context of the Agreement on the Surrender procedure between the EU Member States, Norway and Iceland, the CJEU ruled that an executing authority is not entitled to refuse the execution of an arrest warrant solely on the grounds that another State party has refused to execute a first arrest warrant issued against the same person and for the same acts on the basis of human-rights related grounds. The executing authority that receives the new arrest warrant will have to make its proper assessment and take a decision on the execution of the arrest warrant (*Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)*, see *supra* Section 4).

Human rights scrutiny in relation to third countries. The CJEU clarified that the principle of trust which underpins the EAW FD can also be established by international agreements between Member States and certain third countries. However, the TCA does not establish such a special relationship between the EU and the United Kingdom. In certain aspects, the surrender mechanism provided by the TCA differs substantially from the one provided by the EAW FD. Unlike the two-step examination required in the context of the EAW FD, the test that applies in the context of the TCA assumes that the executing judicial authority must take into account simultaneously both the rules and practices that are generally in place in the United Kingdom and the specific features of the requested person's individual situation (*Alchaster*).

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

- ***Facts.*** German judicial authorities issued four EAWs for the surrender of Radu, a Romanian national, for the purposes of prosecution in respect of acts of aggravated robbery. Radu opposed his surrender and claimed inter alia a breach of the right to a fair trial and the right to be heard (Article 6 ECHR and Articles 47 and 48 Charter) on the ground that he had not been heard before the EAWs were issued. The Romanian court of appeal decided to stay the proceedings and referred a number of questions to the CJEU.
- ***Main question.*** Must the EAW FD, read in the light of Articles 47 and 48 Charter, be interpreted as meaning that the executing authority can refuse to execute an EAW for the purpose of prosecution on the ground that the issuing judicial authority did not hear the requested person before the EAW was issued?
- ***The CJEU's reply.*** **The executing authority cannot refuse to execute the EAW on the ground that 'the requested person was not heard in the issuing Member State before that arrest warrant was issued'.** The CJEU's main arguments follow.
  - **The purpose of the EAW FD.** The EAW FD seeks to replace the multilateral system of extradition between Member States with a system of surrender between judicial authorities based on the principle of mutual recognition. It is aimed at facilitating and accelerating judicial cooperation (paras 33 and 34).
  - **The exhaustive nature of the list of grounds for non-recognition.** The fact that the EAW has been issued for the purposes of conducting a criminal prosecution without the requested person having been heard by the issuing judicial authorities does not feature among these grounds (paras 36–38).
  - **Articles 47 and 48 Charter.** These provisions do not require that the executing judicial authority should be able to refuse to execute an EAW issued for the purpose of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authority before that EAW was issued (para 39).
  - **The effectiveness of the EAW system.**

found on: https://ks.echr.coe.int/documents/d/echr-ks/guide_eu_law_in_echr_case-law_eng (p. 15-18). Also relevant is the joint factsheet of the ECtHR and Fundamental Rights Agency on the EAW (June 2024).

- An obligation for the issuing judicial authority to hear the requested person before the issuing of an EAW would lead to a failure of the surrender system and prevent the achievement of the area of freedom, security and justice (para 40).
- The European legislature has ensured that the right to be heard will be observed in the executing Member State (paras 41 and 42).

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

- See also *infra* 7.5 (on *in absentia* judgments).
- ***Facts.*** Melloni was sentenced *in absentia* to 10 years imprisonment for bankruptcy fraud. An Italian court of appeal issued an EAW for the execution of this sentence. The Spanish executing court authorised the surrender. However, Melloni started constitutional review proceedings before the Spanish constitutional court claiming a breach of his right to a fair trial (Article 24(2) of the Spanish Constitution). The constitutional court had doubts whether the EAW FD precludes the Spanish court from making Melloni's surrender conditional on the right to have the conviction in question reviewed, and referred the case to the CJEU.
- ***Main questions.*** Is Article 4a(1) EAW FD compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial (Article 47 Charter) and the right of the defence (Article 48(2) Charter)? Does Article 53 Charter allow the executing Member State to make the surrender of a person convicted *in absentia* conditional on the conviction being open to review in the issuing Member State to avoid an adverse effect on the right to a fair trial and the right of the defence as guaranteed by the executing Member State's constitution?
- ***The CJEU's reply.*** **Article 4a(1) EAW FD is compatible with the requirements under Articles 47 and 48(2) Charter. Article 53 Charter does not allow that the surrender of a person convicted *in absentia* is made conditional on a national (constitutional) rule that requires the conviction to be open to review in the issuing Member State.** The CJEU's main arguments follow.
  - **The rights included in Articles 47 and 48(2) Charter are not absolute.** The right of the accused to appear in person at their trial is an essential component of the right to a fair trial but not an absolute right. The accused can waive this right provided that certain safeguards are met, i.e. that the waiver is established in an unequivocal manner, that it is accompanied by minimum safeguards commensurate to its importance and that it does not run counter to any important public interest (para 49). The ECtHR takes the same approach in relation to Articles 6(1) and 6(3) ECHR (para 50).
  - **Article 4a(1) EAW FD does not disregard the rights included in Articles 47 and 48(2) Charter.** Article 4a(1) lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, their right to be present at their trial (para 52).
  - **The scope of Article 53 Charter in the light of EU harmonisation.**
    - Under Article 53 Charter, national authorities and courts remain, in principle, free to apply higher national fundamental rights standards, but only if the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised (paras 58–60).
    - Framework Decision 2009/299 effects a harmonisation of the conditions of execution of an EAW in the event of a conviction rendered *in absentia* (para 62);
    - Allowing a Member State to make the surrender conditional on the fulfilment of a requirement not foreseen under Framework Decision 2009/299 would cast doubt on the uniformity of the standard of fundamental rights protection as defined in the EAW FD and undermine the principles of mutual trust and recognition which the EAW FD purports to uphold, therefore compromising its efficacy (para 63).

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

- ***Facts.*** In the *Aranyosi* case, a Hungarian investigating judge issued two EAWs with respect to Aranyosi, a Hungarian national, so that a criminal prosecution could be brought for two offences of forced entry and theft, allegedly committed by Aranyosi in Hungary. In the *Căldăraru* case, a Romanian court issued an EAW with respect to Căldăraru to secure the enforcement in Romania of a prison sentence of 1 year and 8 months imposed for driving without a driving licence. The German court, which had to decide whether those EAWs should be executed, believed that the detention conditions to which both men might be subject in the Hungarian and Romanian prisons, respectively, were contrary to fundamental rights.
- ***Main questions.*** Can or should, on the basis of Article 1(3) EAW FD, an executing judicial authority refuse to execute an EAW if there are serious indications that the detention conditions are not compatible with the fundamental rights, in particular Article 4 Charter? Does Article 1(3) and/or Articles 5 and 6(1) EAW FD mean that the executing judicial authority can or must make its decision conditional on the need for additional information that would assure that detention conditions are compliant?
- ***The CJEU's reply.*** **If there is objective, reliable, specific and updated information of generalised or systematic deficiencies of the detention conditions in the issuing Member State, the executing judicial authority must determine, specifically and precisely, whether there is a real risk. To that end, it must request supplementary information from the issuing judicial authority. On the basis of the information provided, it needs to assess whether a 'real risk' exists. It should then decide to execute the warrant (if there is no real risk) or to postpone the execution (if there is a real risk). If the existence of that 'real risk' cannot be discounted within a reasonable time, it must consider whether to bring the surrender procedure to an end.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the rule** (paras 75–80).
    - Articles 1(1) and 1(2) EAW FD and recitals 5 and 7 indicate that the EAW FD constitutes a completely new regime based on mutual recognition and mutual trust.
    - An EAW must in principle be executed unconditionally, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Exceptions to the rule are allowed only in exceptional circumstances** (paras 82–87).
    - In Opinion 2/13 on the accession of the EU to the ECHR, the CJEU already indicated that exceptions are possible.
    - Article 1(3) EAW FD underlines the duty to comply with the Charter.
    - Article 4 Charter constitutes an absolute right and thus derogations are not permitted.
  - **The Charter is the frame of reference** for assessing whether there is a real risk of inhuman or degrading treatment (para 88).
  - **If there are elements that demonstrate a real risk of inhuman or degrading treatment, the following two-step assessment must be made** (paras 88–97).
    - **Existence of a general risk.** To assess whether there is a real risk of inhuman or degrading treatment due to general detention conditions in the issuing Member State, the executing authority needs to make its assessment on the basis of objective, reliable, specific and properly updated information. This information may be obtained from, for example, judgments of international courts, such as judgments from the ECtHR, judgments of courts of the issuing Member State and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. The deficiencies may be systemic or generalised or may affect certain groups of

people or certain places of detention. Evidence of a real risk in relation to general detention conditions in the issuing Member State cannot, in itself, lead to a refusal to execute the EAW.

- **Existence of a specific risk for the individual concerned.** If there is evidence available of a real risk in relation to general detention conditions, the executing authority must determine whether, in the particular circumstances of the case, there are substantial grounds to believe that the requested person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment. To that end, the executing authority must request of the issuing judicial authority all necessary supplementary information on the conditions in which the requested person will be detained (Article 15 EAW FD). It can also request information on the existence of mechanisms for monitoring detention conditions. In relation to this request, the issuing authority can set a timeline taking into account the time required to collect the information as well as the time limits set in the EAW FD (Article 17 EAW FD).

- **The obligation to postpone the execution of the EAW.** If the executing authority finds that there exists a concrete risk for the requested person, it must postpone the execution of the EAW. During the postponement, the requested person can either be held in custody or provisionally released, provided that it takes measures to prevent the person absconding (paras 98–101).
- **The final decision on the execution of the EAW.** If the executing judicial authority obtains supplementary information that permits it to discount the existence of a real risk that the requested person will be subject to inhuman and degrading treatment in the issuing Member State, it must adopt its decision on the execution of the EAW. If, however, the existence of such a risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end (para 103).
- **In case of delays, Member States are, pursuant to Article 17(7) EAW FD, obliged to inform Eurojust and/or the Council** (para 99).
  - Where the executing authority decides on a postponement, the executing Member State is to inform Eurojust, in accordance with Article 17(7) EAW FD, giving the reasons for the delay.
  - In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of EAWs is to inform the Council with a view to an evaluation, at Member State level, of the implementation of the EAW FD.

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

- ***Facts.*** In August 2017, the District Court in Hungary issued an EAW against ML, a Hungarian national, so that he could be prosecuted and tried for offences of bodily harm, damage, fraud and burglary committed in Hungary in 2016. By judgment of 14 September 2017, the District Court sentenced ML *in absentia* to a custodial sentence of 1 year and 8 months. By letter of 20 September 2017, the Hungarian Ministry of Justice informed the Bremen public prosecutor's office, in response to a request sent by the latter, that, if ML were surrendered, he would initially be detained, for the duration of the surrender procedure, in Budapest prison (Hungary) and thereafter in Szombathely regional prison (Hungary). The ministry also gave an assurance that ML would not be subjected to any inhuman or degrading treatment within the meaning of Article 4 Charter as a result of the proposed detention in Hungary. The ministry added that that assurance could equally well be given in the event of ML being transferred to another prison. On 31 October 2017, the District Court issued a further EAW in respect of ML, this time for the

purpose of executing the custodial sentence imposed by that court on 14 September 2017. To assess the legality of the surrender from the point of view of detention conditions in Hungarian prisons, the German court considered it necessary to obtain additional information.

- ***Main questions.*** Must Articles 1(3), 5 and 6(1) EAW FD be interpreted as meaning that an executing judicial authority may rule out the existence of a 'real risk' merely because that person has, in the issuing Member State, a legal remedy enabling them to challenge the detention conditions? If that is not the case, is that authority then required to assess the detention conditions in **all** the prisons in which the person concerned could potentially be detained? Must the executing judicial authority assess all the detention conditions? May, in the context of that assessment, that authority take into account information such as, in particular, an assurance that the person concerned will not be subjected to inhuman or degrading treatment, provided by authorities of the issuing Member State other than the executing judicial authority?
- ***The CJEU's reply.*** **The executing judicial authority cannot rule out a 'real risk' merely because the person has, in the issuing Member State, a legal remedy permitting them to challenge the detention conditions. The executing judicial authority is required to assess only the detention conditions in the prisons in which, according to the available information, that person will be detained, including on a temporary or transitional basis. The executing judicial authority must assess solely the actual and precise detention conditions that are relevant for determining whether that person will be exposed to a 'real risk'. The executing judicial authority may take into account information such as, in particular, an assurance that the individual concerned will not be subject to inhuman or degrading treatment, provided by authorities of the issuing Member State other than the issuing judicial authority.** The CJEU's main arguments follow.
  - **Need for accurate and updated information.** Even though the CJEU is not questioned about the existence of systemic or generalised deficiencies, the CJEU underlines, in this regard, that the referring court must verify the accuracy of the available information on the basis of properly updated information (paras 67–71).
  - **The existence of a legal remedy cannot suffice on its own to rule out a real risk.** It does not exempt the executing judicial authority from undertaking an individual assessment of the situation of each person concerned (paras 72–76).
  - **The extent of the assessment of detention conditions** (paras 77–107).
    - **The prisons to be assessed.** The executing authority is solely required to assess the detention conditions in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis (paras 87–89).
      - The objective of the EAW FD is to facilitate and accelerate surrenders (para 82).
      - The option available under Article 15(2) EAW FD to request necessary supplementary information is a last resort to which recourse may be had only in exceptional cases (para 79, with reference to *Piotrowski*).
      - Member States are required to comply with the time limits of the EAW FD (para 83, with reference to *Piotrowski*).
      - An obligation to assess the detention conditions in all the prisons in which the person might be detained is clearly excessive (para 84).
    - **The assessment of the detention conditions** (paras 90–107).
      - If ill-treatment is to fall within the scope of Article 3 ECHR, it must attain a minimum level of severity, which depends on all the circumstances of the case, such as the duration of the treatment, the treatment's physical and mental effects and, in some cases, the sex, age and state of health of the victim (para 91, with reference to ECtHR, *Muršić* v *Croatia*).

- In view of the importance attaching to the space factor in the overall assessment of detention conditions, a strong presumption of a violation of Article 3 ECHR arises when the personal space available to a detainee is below 3 m^2 in multi-occupancy accommodation (paras 92 and 93, with reference to ECtHR, *Muršić* v *Croatia*).
- In the present case, the executing judicial authority must determine only whether the person concerned will be exposed to a real risk in Budapest prison (paras 94 and 95).
- The fact that detention in Budapest prison is temporary or transitional does not, on its own, rule out all real risk of inhuman or degrading treatment within the meaning of Article 4 Charter (paras 96–100, with reference to ECtHR, *Muršić* v *Croatia*).
- If the executing judicial authority considers that the information available to it is insufficient to allow it to adopt a surrender decision, it may request supplementary, necessary information in accordance with Article 15(2) EAW FD (para 101).
- In the present case the executing authority had sent 78 questions to enquire about detention conditions in Budapest prison and in any other facility in which the person concerned might be held (para 102). Those questions, because of their number, their scope (every prison in which the person concerned might be held) and their content (aspects of detention that are of no obvious relevance for the purposes of that assessment, such as, for example, opportunities for religious worship, whether it is possible to smoke, the arrangements for the washing of clothing and whether there are bars or slatted shutters on cell windows) make it, in practice, impossible for the authorities of the issuing Member State to provide a useful answer, given, in particular, the short time limits laid down in Article 17 EAW FD.
- A request of that nature, which results in the operation of the EAW being brought to a standstill, is not compatible with the duty of sincere cooperation (Article 4(3) of the Treaty of European Union (TEU)), which must inform the dialogue between the executing and issuing judicial authorities when, inter alia, information is provided pursuant to Articles 15(2) and 15(3) EAW FD (para 104).

▪ **The taking into account of assurances given by the authorities of the issuing Member State** (paras 108–115).

- In accordance with Articles 15(2) and 15(3) EAW FD and Article 4(3) TEU, the executing judicial authority and the issuing judicial authority may, respectively, request information or give assurances concerning the actual and precise conditions in which the person concerned will be detained in the issuing Member State (paras 108–110).
- The assurance provided by the competent authorities of the issuing Member State is a factor that the executing judicial authority cannot disregard (para 111).
- When that assurance has been given, or at least endorsed, by the issuing judicial authority, the executing judicial authority must rely on that assurance, at least in the absence of any specific indications that the detention conditions in a particular detention centre are in breach of Article 4 Charter (para 112).
- When, as in the present case, the assurance was neither provided nor endorsed by the issuing judicial authority, it must be evaluated by

carrying out an overall assessment of all the information available to the executing judicial authority (paras 113 and 114).

- In the present case, the assurance given by the Hungarian Ministry of Justice appears to be borne out by the information in the possession of the German public prosecutor's office and, that being so, it appears that the person concerned may be surrendered to the Hungarian authorities without any breach of Article 4 Charter, a matter that must, however, be verified by the referring court (para 115).

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

- ***Facts.*** In February 2012, June 2012 and September 2013, Polish courts issued three EAWs against LM for the purpose of conducting criminal prosecutions, inter alia for trafficking in narcotic drugs. In May 2017, LM was arrested in Ireland on the basis of those EAWs and brought before the referring court, the High Court of Ireland. He informed that court that he did not consent to his surrender to the Polish judicial authorities and was placed in custody pending a decision on his surrender to them. In support of his opposition to being surrendered, he submitted that his surrender would expose him to a real risk of a flagrant denial of justice in contravention of Article 6 ECHR (right to a fair trial) and relied, in particular, on the reasoned proposal, submitted by the European Commission, on 20 December 2017, in accordance with Article 7(1) TEU.
- ***Main question.*** Notwithstanding *Aranyosi and Căldăraru*, where a national court determines that there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where the individual's trial will take place within a system no longer operating within the rule of law?
- ***The CJEU's reply.*** **Article 1(3) EAW FD must be interpreted as meaning that, where the executing judicial authority has material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by Article 47(2) Charter on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to the individual's personal situation, as well as to the nature of the offence for which they are being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) EAW FD, as amended, there are substantial grounds for believing that that individual will run such a risk if they are surrendered to that Member State.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the rule** (paras 36–42). An EAW must in principle be executed, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Limitations** may be placed on the principles of mutual recognition and mutual trust in **exceptional circumstances** on the basis of Article 1(3) EAW FD (paras 43–45, with reference to *Aranyosi and Căldăraru*).
  - A real risk of breach of the fundamental **right to an independent tribunal** and, therefore, of the essence of the fundamental **right to a fair trial (Article 47(2) Charter)** is capable of permitting the executing judicial authority to **refrain**, by way of exception, **from giving effect to an EAW** (paras 48–58 with reference to Case C-64/16 *Associação Sindical dos Juízes Portugueses*).

- **Two-stage examination** (paras 60–68, with reference to *Aranyosi and Căldăraru*).
  - **First step: the 'systemic' assessment.** The authority must assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment (para 61).
  - **No automatic suspension of the EAW system where there is a reasoned proposal of the Commission.** It is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU with a view to application of the EAW mechanism being suspended in respect of that Member State (para 71). It is only if the European Council were to adopt a decision as provided for in Article 7(2) TEU and the Council were then to suspend the EAW FD in respect of that Member State that the executing judicial authority would be required to refuse automatically to execute any EAW issued by it, without having to carry out any specific assessment (para 72). Accordingly, as long as such a decision has not been adopted by the European Council, the executing judicial authority may refrain, on the basis of Article 1(3) EAW FD, to give effect to an EAW issued by a Member State that is the subject of a reasoned proposal as referred to in Article 7(1) TEU only in exceptional circumstances and after carrying out a specific and precise assessment of the particular case (para 73).
  - **Second step: the 'specific' assessment.** The authority must **assess specifically and precisely** whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the individual's surrender to the issuing Member State, **the requested individual will run that risk** (paras 68 and 73). In the course of such an assessment, the executing judicial authority must, in particular, examine to what extent the systemic or generalised deficiencies are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which the requested individual will be subject (para 74). If that examination shows that those deficiencies are liable to affect those courts, the executing judicial authority must also assess, in the light of the specific concerns expressed by the individual concerned and any information provided by the individual, whether there are substantial grounds for believing that the individual will run a real risk of breach of their fundamental right to an independent tribunal and, therefore, of the essence of their fundamental right to a fair trial, having regard to their personal situation, as well as to the nature of the offence for which the individual is being prosecuted and the factual context that forms the basis of the EAW (para 75). The executing authority must also take into account the information provided by the issuing authority on the basis of Article 15(2) EAW FD (paras 76 and 77).

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

- ***Facts.*** In August 2016, German authorities received an EAW from Romania for the surrender of Dorobantu, a Romanian national, residing in Germany. The EAW was issued for the purposes of conducting a criminal prosecution in respect of offences relating to property and to forgery and the use of forged documents. In accordance with the *Aranyosi and Căldăraru* case-law, the

German court requested additional information from the Romanian authorities. In January 2017, the German authorities decided to authorise the surrender. However, shortly afterwards, the German Federal Constitutional Court set aside this decision. It ruled that the assessment as to the legality of Dorobantu's surrender required a request for a preliminary ruling to the CJEU in relation to the factors relevant to the assessment of the detention conditions in the issuing Member State.

- ***Main questions.*** What is the extent and scope of the review which the executing judicial authority must undertake to assess whether a person will run a 'real risk' of being subject to inhuman or degrading treatment within the meaning of Article 4 Charter (comprehensive review or limited to manifest inadequacies)? Must the executing authority take account of a minimum requirement as to space per detainee in a prison cell and, if so, what would be the rules on calculating that space? Must the executing authority for the purposes of that assessment take into account the existence of legislative and structural measures relating to the improvement of the review of detention conditions in the issuing Member State? May the executing authority weight the issuing Member State's failure to comply with the minimum requirements in relation to detention conditions against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition?
- ***The CJEU's reply*. The executing judicial authority must take account of all the relevant physical aspects of the conditions of detention in the prison in which it is actually intended that that person will be detained, such as the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison. That assessment is not limited to the review of obvious inadequacies. For the purposes of that assessment, the executing judicial authority must request from the issuing judicial authority the information that it deems necessary and must rely, in principle, on the assurances given by the issuing judicial authority, in the absence of any specific indications that the conditions of detention infringe Article 4 Charter. As regards, in particular, the personal space available to each detainee, the executing judicial authority, in the absence, currently, of minimum standards in that respect under EU law, must take account of the minimum requirements under Article 3 ECHR. The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because the person concerned has, in the issuing Member State, a legal remedy enabling that person to challenge the conditions of their detention or because there are, in the issuing Member State, legislative or structural measures that are intended to reinforce the monitoring of detention conditions. A finding, by the executing judicial authority, that there are substantial grounds for believing that, following the surrender of the person concerned to the issuing Member State, that person will run such a risk cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.** The CJEU's main arguments follow.
  - **The executing judicial authority must determine, specifically and precisely, whether there are substantive grounds for a real risk in the specific case at hand.**
    - In the present case, the referring court found that there was specific evidence of systemic and generalised deficiencies in detention conditions in Romania. It is for the referring court to verify the accuracy by taking account of properly updated information (para 53, with reference to *ML* (*Conditions of detention in Hungary*)).
    - The mere existence of evidence that there are deficiencies does not necessarily imply that, in a specific case, the individual concerned will be subjected to inhuman or degrading treatment if the individual is surrendered (para 54, with reference to *Aranyosi and Căldăraru*).

- The executing judicial authority, when faced with evidence of the existence of such deficiencies that is objective, reliable, specific and properly updated, is bound to determine, specifically and precisely, whether, in the particular circumstances of the case, there are substantial grounds for believing that, following the surrender of that person to the issuing Member State, that person will run a real risk of being subject in that member State to inhuman or degrading treatment within the meaning of Article 4 Charter (para 55, with reference to *Aranyosi and Căldăraru* and *ML* (*Conditions of detention in Hungary*)).
- The interpretation of Article 4 Charter corresponds, in essence, to the meaning conferred on Article 3 ECHR by the ECtHR. The ECtHR has ruled that a court of a Member State party to the ECHR could not refuse to execute an EAW on the ground that the requested person was exposed to a risk of being subjected, in the issuing Member State, to detention conditions involving inhuman or degrading treatment if that court had not first carried out an up-to-date and detailed examination of the situation as it stood at the time of its decision and had not sought to identify structural deficiencies in relation to detention conditions and a risk, that is both real and specific to the individual, of infringement of Article 3 ECHR in that Member State (with reference to ECtHR, *Romeo Castaño v Belgium*).

- **The executing judicial authority must assess all the relevant physical aspects of the detention, but only in relation to the prison in which it is actually intended that that person will be detained.**
  - The meaning and scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR but also by the case-law of the ECtHR and by that of the CJEU (para 58).
  - To fall within the scope of Article 3 ECHR, ill-treatment must attain a minimum level of severity (para 59, with reference to *ML* (*Conditions of detention in Hungary*)).
  - The review must be based on an overall assessment of all the relevant physical aspects of the detention, e.g. the personal space available to each detainee in a cell in that prison, sanitary conditions and the extent of the detainee's freedom of movement within the prison (paras 61 and 85).
  - The assessment is not limited to obvious inadequacies only because the prohibition of inhuman or degrading treatment is absolute (para 62, with reference to *Aranyosi and Căldăraru*).
  - The executing judicial authority must, pursuant to Article 15(2) EAW FD, request all necessary supplementary information regarding the detention conditions (para 67, with reference to *ML* (*Conditions of detention in Hungary*)).
  - The assessment must concern the conditions only in the detention centre in which it is actually intended that the requested person will be detained (paras 63–67, with reference to *ML* (*Conditions of detention in Hungary*)).
  - In principle, the executing judicial authority must rely on the assurance given or endorsed by the issuing judicial authority stating that the requested person will not suffer inhuman or degrading treatment because of the actual and precise detention conditions (paras 68 and 69, with reference to *ML* (*Conditions of detention in Hungary*)).
- **The executing judicial authority must follow the ECtHR's case-law when assessing and calculating the required minimum personal space in a multi-occupancy cell.**

- In the light of Article 52(3) Charter, and in the absence of minimum EU standards on detention conditions, the CJEU relies on the case-law of the ECtHR in relation to Article 3 ECHR (paras 71 and 77, with reference to ECtHR, *Muršić* v *Croatia*).
- If the personal space available to a detainee is below 3 m² in multi-occupancy accommodation, there is a strong presumption of a violation of Article 3 ECHR. If the personal space is in the range of 3–4 m², the space factor remains an important factor in the assessment of the adequacy of detention. If a detainee has more than 4 m² of personal space, and therefore no issue with regard to the question of personal space arises, other aspects of physical detention conditions remain relevant to the assessment of adequacy of an individual's detention conditions under Article 3 ECHR (paras 72–76, with reference to *ML* (*Conditions of detention in Hungary*) and ECtHR, *Muršić* v *Croatia*).
- The calculation of the space should not include sanitary facilities but should instead include the space occupied by furniture, provided that the detainee still has the possibility of moving around normally within the cell (para 77, with reference to ECtHR, *Muršić* v *Croatia*).
- It is for the referring court to assess all relevant circumstances for the purposes of the analysis it is required to make, if necessary by asking the issuing judicial authority for the necessary supplementary information (para 78).
- It is open to the Member States to make provision in respect of their own prison system for minimum standards in terms of detention conditions that are higher than those resulting from Article 4 Charter and Article 3 ECHR, as interpreted by the ECtHR. However, in the context of the EAW FD, a Member State may make the surrender to the issuing Member State of the person concerned by an EAW subject only to compliance with the latter requirements and not with those resulting from its own national law (para 79, with reference to *Melloni*).

- **The executing judicial authority cannot rule out the existence of a real risk of inhuman or degrading treatment merely because there is a legal remedy enabling the person to challenge the detention conditions or because there are legislative or structural measures intended to reinforce the monitoring of detention conditions** (paras 80 and 81, with reference to *ML* (*Conditions of detention in Hungary*)).
- **The executing judicial authority cannot, when deciding on the surrender, weight the finding of a 'real risk' against considerations relating to the efficacy of judicial cooperation and to the principles of mutual trust and recognition** (paras 82–84).

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

- ***Facts.*** See *supra* 3.3 (on judicial authority).
- ***Main questions.*** If the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, may that authority presume that there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by Article 47(2) Charter? Can the executing authority presume this without carrying out a specific and precise verification, which would take account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context surrounding the issuing of that warrant?
- ***CJEU's reply.*** **Articles 6(1) and 1(3) EAW FD must be interpreted as meaning that the executing judicial authority cannot presume that there are substantial grounds for believing that that person will run a real risk of breach of his or her fundamental right to a fair trial, without carrying out a specific and precise verification. This verification must take account of, inter alia, his or her personal situation, the nature of the offence in**

question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled. The CJEU's main arguments follow.

- **CJEU confirms the two-step examination set out in *Minister for Justice and Equality (Deficiencies in the system of justice)*.**
  - The possibility of refusing to execute an EAW based on Article 1(3) EAW FD presupposes a two-step examination (paras 53–55, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*).
  - In the absence of a formal decision of the Council under Article 7 TEU, an executing judicial authority cannot refuse automatically to execute an EAW, without having to carry out any specific assessment (paras 57–60, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*).
  - An automatic refusal would also go against one of the main objectives of the EAW mechanism, which is to combat impunity (paras 62–64).
  - An executing judicial authority that is aware of indications that there are indications of systemic or generalised deficiencies or that there has been an increase in such deficiencies must be vigilant. However, the authority cannot rely on that finding alone in order to refrain from carrying out the second step of the examination (para 60).
  - In the context of the second step, the executing authority must assess if there are substantial grounds for believing that that person will run a real risk of breach of his or her right to a fair hearing after surrender to the issuing Member State. The authority must consider the following factors (para 61, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice)*):
    - the personal situation of the requested person;
    - the nature of the offence;
    - the factual context in which that arrest warrant has been issued, such as statements by public authorities, which are liable to interfere with the handling of an individual case;
    - the information that the issuing judicial authority may have communicated to it pursuant to Article 15(2) EAW FD.
  - If an EAW is for the purpose of prosecution, the executing judicial authority must examine in particular to what extent the systemic or generalised deficiencies are liable to have an impact at the level of that Member State's courts with jurisdiction over the proceedings to which that person will be subject. That examination therefore involves taking into consideration the impact of such deficiencies, which may have arisen after the issue of the EAW concerned (para 66).
  - If an EAW is for the purpose of the execution of a custodial sentence, the executing judicial authority must examine to what extent the systemic or generalised deficiencies which existed in the issuing Member State at the time of issue of the EAW have, in the particular circumstances of the case, affected the independence of the court of that Member State which imposed the custodial sentence or detention order the execution of which is the subject of that EAW (para 68).

- **CJEU recalls the consequences that follow from the outcome of the two-step examination.**
  - If the executing authority finds there are substantial grounds for believing that the person will run a real risk, the executing judicial authority must refrain, pursuant to Article 1(3) EAW, from giving effect to the EAW (para 61).
  - Otherwise, it must execute that warrant, in accordance with the obligation of principle laid down in Article 1(2) EAW FD (para 61).

Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*, Judgment of 22 February 2022.

- ***Facts.*** In April 2022, Polish courts issued two EAWs against two Polish nationals, one for the purpose of executing a 2-year custodial sentence for extortion and threats of violence and the other for the purpose of conducting a criminal prosecution. The Dutch court that received the EAWs had doubts concerning its obligation to execute those EAWs in the light of systemic or generalised deficiencies affecting the right to a fair trial, and in particular the right to a tribunal previously established by law, resulting, inter alia, from the fact that Polish judges are appointed on application of the Krajowa Rada Sądownictwa (the Polish National Council of the Judiciary, KRS). According to a resolution the Polish Supreme Court adopted in 2020, since the entry into force of a law on judicial reform on 17 January 2018, the KRS is no longer an independent body. In so far as the judges appointed on application of the KRS may have participated in the criminal proceedings that led to the conviction of one of the persons concerned or may be called on to hear the criminal case of the other person concerned, the referring court considers there to be a real risk that those persons, if surrendered, would suffer a breach of their right to a tribunal previously established by law.
- ***Main question.*** Is the two-step examination enshrined by the CJEU in its previous case-law on the fundamental right to a fair trial (C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the System of Justice)*; C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*) also applicable where the guarantee of 'a tribunal previously established by law', which is also part of that fundamental right, is at issue?
- ***CJEU's reply.*** **Articles 1(2) and 1(3) EAW FD must be interpreted as meaning that, where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender the requested person only if it finds that, in the particular circumstances of the case, there are substantial grounds for believing that there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law or that the requested person, if surrendered, faces a real risk of a breach of that fundamental right.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the point of departure.**
    - Save in exceptional circumstances, Member States must consider all the other Member States to be complying with EU law and with the fundamental rights recognised by EU law (para 40).
    - Member States may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law (para 41).
    - Save in exceptional circumstances, Member States may not check whether the other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU (para 41).

- Dialogue between the issuing and executing judicial authorities is crucial. These authorities must make full use of the instruments provided for in Article 8(1) and Article 15 EAW FD in order to foster mutual trust on the basis of that cooperation (para 49).

- **The two-step examination applies in relation to the fundamental right to a fair trial before a tribunal previously established by law** (paras 50–66, with reference to *Minister for Justice and Equality* (*Deficiencies in the System of Justice*) and *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*).
  - **First step (general assessment).** The executing judicial authority must carry out an overall assessment, on the basis of any evidence that is objective, reliable, specific and properly updated, concerning the operation of the issuing Member State's judicial system, in particular the general context of the appointment of judges in that Member State (paras 67–77).
    - The assessment must be carried out having regard to the standard of protection of the fundamental right that is guaranteed by Article 47(2) Charter (paras 68–71, with reference to relevant case-law).
    - The right to be judged by a tribunal 'established by law' encompasses the judicial appointment procedure; however, not every irregularity in the judicial appointment procedure can be regarded as constituting a breach of this right (paras 71–73).
    - The fact that a body made up of, for the most part, members representing or chosen by the legislature or the executive intervenes in the judicial appointment procedure in the issuing Member State is not sufficient, in itself, to justify the executing judicial authority refusing to surrender the person concerned. However, the situation may be different where that fact, combined with other relevant factors and the conditions under which those choices were made, leads to doubts being raised as to the independence of the judges appointed (paras 75–76).
    - In the present case, relevant factors include information contained in a reasoned proposal that the European Commission addresses to the Council on the basis of Article 7(1) TEU; the abovementioned resolution of the Polish Supreme Court; relevant judgments of the CJEU, particularly those which contain indications as to the state of operation of the issuing Member State's judicial system; relevant judgments of the ECtHR; and constitutional law of the issuing Member State that challenges the primacy of EU law and the binding nature of the ECHR, and the binding force of judgments of the CJEU and the ECHR (paras 78–80, with reference to relevant case-law).
  - **Second step (specific assessment).**
    - The requested person must adduce specific evidence to suggest that systemic or generalised deficiencies in the judicial system had a tangible influence on the handling of his or her criminal case, or are liable, in the event of surrender, to have such an influence (para 83).
    - **EAWs for the purpose of executing a custodial sentence.** The executing judicial authority must assess the information relating to the composition of the panel of judges who heard the requested person's criminal case or to any other circumstance relevant to the assessment of the independence and impartiality of that panel. It is not sufficient that one or more judges who participated in those proceedings were appointed on application of a body such as the KRS. The person concerned must, in addition, provide information relating to, inter alia,

the procedure for the appointment of the judges concerned and their possible secondment, which would lead to a finding that the composition of that panel of judges was such as to affect that person's fundamental right to a fair trial. Furthermore, account must be taken of the fact that it may be possible for the person concerned to request the recusal of members of the panel of judges on the ground that their participation would breach his or her fundamental right to a fair trial and, if the requested person exercises that option, the outcome of the request for recusal (paras 87–92).

- **EAWs for the purpose of prosecution.** The executing judicial authority must take account of the information related to the personal situation of the person concerned, the nature of the offence for which that person is being prosecuted, the factual context surrounding that EAW, or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called on to hear the proceedings in respect of that person after his or her surrender (para 97). By contrast, the fact that the identities of the judges who will eventually be called on to hear the case of the person concerned are not known at the time of the decision on surrender or, when their identity is known, that those judges were appointed on application of a body such as the KRS is not sufficient to refuse that surrender (paras 93 and 98).
- Requests for additional information from the issuing judicial authority, in accordance with Article 15 EAW FD, must be made when the executing judicial authority believes that the evidence put forward suggests, but is insufficient to prove, the abovementioned deficiencies (para 84).
- Any conduct showing a lack of sincere cooperation on the part of the issuing judicial authority may be regarded by the executing judicial authority as a relevant factor for the purposes of assessing whether the person whose surrender is requested, if surrendered, faces a real risk of a breach of his or her right to a fair trial before a tribunal previously established by law (para 85).

Case C-480/21, *Minister for Justice and Equality (Tribunal établi par la loi dans l'État membre d'émission – II)*, Order of 12 July 2022.

- ***Facts.*** WO and JL were the subjects of a number of EAWs requesting their surrender to the Polish judicial authorities. The Irish High Court ordered their surrender. However, the requested persons applied for and obtained leave to appeal to the Irish Supreme Court, which is the referring court in the present case. The central argument of the requested persons was that the situation in Poland had changed since the pronouncement of the Supreme Court's judgment, delivered following the pronouncement of the CJEU's judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU), as a result, in particular, of the adoption of the Law amending the Law on the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws, of 20 December 2019. Since the adoption of this law, there has been a risk that the Polish courts that will examine the requested persons' case will not be constituted in accordance with the requirements of independence, as laid down in the judgment of 2 March 2021 in Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême – Recours)*. In addition, the requested persons argued that no mechanism in Poland enables them to challenge that illegality.
- ***Main question.*** May the executing judicial authority refuse to surrender the requested person on the basis that, in the event of surrender, there is a real risk of a breach of that person's

fundamental right to a fair trial before a tribunal previously established by law, enshrined in Article 47(2) Charter, where (i) in the context of an EAW issued for the purpose of executing a custodial sentence or detention order, no effective judicial remedy is available for any breach of that fundamental right during the procedure that led to the person's conviction and (ii) in the context of an EAW issued for the purpose of conducting a criminal prosecution, the person concerned cannot determine, at the time of surrender, the composition of the panel of judges before which that person will be tried, because of the manner in which cases are randomly allocated among the courts concerned, and there is no effective remedy in the issuing Member State to challenge the validity of the judicial appointment?

- ***CJEU's reply.*** **Articles 1(2) and 1(3) EAW FD must be interpreted as meaning that, where the executing judicial authority has evidence of systemic or generalised deficiencies concerning the independence of the judiciary in the issuing Member State, in particular as regards the procedure for the appointment of the members of the judiciary, that authority may refuse to surrender that person:**
  - **in the context of an EAW issued for the purpose of executing a custodial sentence or detention order, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard, inter alia, to the information provided by that person relating to the composition of the panel of judges who heard his or her criminal case, or to any other circumstance relevant to the assessment of the independence and impartiality of that panel, there has been a breach of that person's fundamental right to a fair trial before an independent and impartial tribunal previously established by law, enshrined in Article 47(2) Charter;**
  - **in the context of an EAW issued for the purposes of conducting a criminal prosecution, only if that authority finds that, in the particular circumstances of the case, there are substantial grounds for believing that, having regard, inter alia, to the information provided by the person concerned relating to his or her personal situation, the nature of the offence for which that person is being prosecuted, the factual context surrounding that EAW, or any other circumstance relevant to the assessment of the independence and impartiality of the panel of judges likely to be called on to hear the proceedings in respect of that person, the requested person, if surrendered, faces a real risk of breach of that fundamental right.**
- The CJEU's main arguments are similar to those mentioned in Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*.

Case C- 158/21, *Puig Gordi and Others*, Judgment of 31 January 2023.

- See also *supra* 2 (on the admissibility of a request for preliminary ruling by an issuing judicial authority), *supra* 3.3 (on the validity of the EAW), *supra* 4 (on the possibility to issue several successive EAWs and obligation to decide on the execution of the EAW) and *infra* 10 (on requests for additional information).
- ***Facts.*** The Spanish Supreme Court referred questions to the CJEU which had arisen in the context of the prosecution of former Catalan leaders following a referendum, held on 1 October 2017, concerning self-determination for the Autonomous Community of Catalonia (Spain). EAWs were issued for some of the defendants who had left Spain, including Lluís Puig Gordi. The Belgian courts refused to give effect to the EAW issued for Lluís Puig Gordi. They considered that there was a risk that his right to be tried by a tribunal established by law would be infringed, given that the jurisdiction of the Spanish Supreme Court to try the persons sought did not have an express legal basis.
- ***Main questions.*** May an executing judicial authority refuse to execute an EAW by relying on a ground for non-execution which is not set out in the EAW FD or on the grounds that the issuing judicial authority does not have jurisdiction to issue the EAW in question? Which are the

conditions under which the executing judicial authority may refuse to execute that EAW on the grounds of an alleged infringement of the defendant's fundamental rights? May the executing judicial authority, for that purpose, assess the jurisdiction of the court called upon to try the requested person in the event of him or her being surrendered to the issuing Member State?

- ***CJEU's reply*. An executing judicial authority does not have the power to refuse to execute an EAW on the basis of a ground for non-execution which arises not from that framework decision but solely from the law of the executing Member State. However, that judicial authority may apply a national provision which provides that the execution of an EAW is to be refused where that execution would lead to an infringement of a fundamental right enshrined in EU law, provided that the scope of that provision does not go beyond the scope of Article 1(3) EAW FD as interpreted by the Court. Article 1(3) EAW FD, read in conjunction with Article 47(2) Charter, must be interpreted as meaning that the executing judicial authority called upon to decide on the surrender of a person for whom an EAW has been issued may not refuse to execute that warrant on the ground that that person is at risk, following his or her surrender, of being tried by a court which lacks jurisdiction, unless the two-step test is met (see below). The existence of a WGAD report which does not directly relate to that person's situation may not, in itself, be justification for the executing judicial authority to refuse to execute that EAW, but such a report may, however, be taken into account by that judicial authority, among other elements, in order to assess whether there are systemic or generalised deficiencies in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs.** The CJEU's main arguments follow.
  - **Any grounds for deciding not to give effect to an EAW must stem from the EAW FD.**
    - Only EAWs within the meaning of Article 1(1) EAW FD must be executed, which requires that such a warrant, which is classified in that provision as a 'judicial decision', be issued by a 'judicial authority' within the meaning of Article 6(1) EAW FD (para 69, with reference to *Openbaar Ministerie (Independence of the issuing judicial authority)*.
    - **Validity.** The executing judicial authority must not give effect to an EAW which does not meet the minimum requirements on which its validity depends, including those laid down in Article 8 EAW FD (para 70, with reference to *IK (Enforcement of an additional sentence)*.
    - **Refusal grounds.** The executing judicial authorities must or may refuse to execute an EAW on the grounds for non-execution set out in Articles 3, 4 and 4a EAW FD (para 71, with reference to *PF (Prosecutor General of Lithuania)*.
    - **Fundamental rights.** The existence of a risk of infringement of the fundamental rights set out in Articles 4 and 47 Charter is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW on the basis of Article 1(3) EAW FD (para 72, with reference to *Dorobantu* and *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
    - Allowing Member States to add other grounds would undermine the uniform application of the EAW FD, render ineffective the obligation to execute EAWs, impede the proper operation of the simplified and effective system for the surrender and run counter to the objective pursued by the EAW FD (paras 75–76).
    - In the present case, the Belgian courts refused to execute the EAW on the basis of Article 4(5) of the Belgian law on the EAW, which provides that the execution of an EAW is to be refused if there are serious reasons for believing that that execution would have the effect of infringing the fundamental rights of the

person concerned enshrined in EU law. Such a provision, in so far as it is interpreted as having the same scope as Article 1(3) EAW FD, allows a refusal to execute an EAW only in the context referred to in the CJEU's case-law and cannot therefore be regarded as establishing a ground for non-execution which does not stem from the EAW FD.

- **Mutual recognition and mutual trust are the point of departure.**
  - Save in exceptional circumstances, Member States must consider all the other Member States to be complying with EU law and with the fundamental rights recognised by EU law (para 93, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - Member States may not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law (para 94, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - Save in exceptional circumstances, Member States may not check whether the other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU (para 94, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - The executing judicial authority may only exceptionally refrain from giving effect to an EAW on the basis of Article 1(3) EAW (para 96, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* and para 118, with reference to Opinion 2/13).
  - The interpretation of the EAW FD requires the taking into consideration of different interests, not only the guarantees which, for the requested person, stem from Article 47 (2) Charter, but also other interests, such as the need to observe, where appropriate, the fundamental rights of the victims of the offences concerned (para 118, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*.
- **The two-step examination in relation to the fundamental right to a fair trial before a tribunal previously established by law – (lack of) jurisdiction of the trial court.**
  - As regards the applicability of that two-step examination, the executing judicial authority is required to assess whether, if the person concerned is surrendered to the issuing Member State, that person runs a real risk of infringement of his or her fundamental right to a fair trial before a tribunal previously established by law as enshrined in Article 47(2) Charter (para 98, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - It follows from the case-law of the ECtHR that the jurisdiction of a court to hear a case, under the relevant national rules, is part of the requirement to have a 'tribunal established by law' (paras 99–100, with reference to relevant case-law from the ECtHR).
  - **First step (systemic or generalised deficiencies or deficiencies affecting an objectively identifiable group of persons to which the requested person belongs).**
    - The executing judicial authority must determine whether there is objective, reliable, specific and properly updated information to demonstrate that there is a real risk of infringement, in the issuing Member State, of the fundamental right to a fair trial, connected in particular with a failure to comply with the requirement for a tribunal established by law, on account of systemic or generalised deficiencies in that Member State or deficiencies affecting an objectively identifiable group of persons to which the person concerned belongs (para 102, with

reference to *Aranyosi and Căldăraru* and *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).

- The executing judicial authority must carry out an overall assessment of the operation of the judicial system of the issuing Member State in the light of the requirement for a tribunal established by law (para 103, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
- The executing judicial authority must take the view that those deficiencies are established if it is apparent from that overall assessment that the defendants are generally deprived, in that Member State, of an effective legal remedy enabling the jurisdiction of the criminal court called upon to try them to be reviewed, in the form of an examination of its own jurisdiction by that court or an action available before another court (para 103).
- The executing judicial authority must consider in its overall assessment the course of proceedings relating to the EAW before the courts of the issuing Member State, in so far as it gives indications as to the practices of those courts and their interpretation of the relevant national rules, in particular in a situation such as that in the main proceedings where, under the law of that Member State, the same court is, in principle, called on to carry out the functions of an issuing judicial authority and of a court giving judgment (para 105, with reference to *Dorobantu*).
- The fact that the person concerned was able, before the courts of the issuing Member State, to rely on his or her fundamental rights in order to challenge the competence of the issuing judicial authority and the EAW issued for him or her is of no decisive importance (paras 104 and 120).
- A report of the UN Working Group on Arbitrary Detention (WGAD) is one of the factors to consider in the assessment of the first step.
  - A WGAD report which does not directly relate to the individual situation of the requested person cannot suffice to justify a refusal to execute the EAW (para 123).
  - It follows from the CJEU's case-law that the objective, reliable, specific and properly updated information on which the executing judicial authority must rely to complete the first step of the examination may be obtained from, inter alia, judgments of international courts, such as ECtHR judgments, 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 (para 124, with reference to *Aranyosi and Căldăraru*).
  - Given that the WGAD's mandate stems from Resolutions 15/18, 20/16 and 33/30 of the United Nations Human Rights Council, which itself was created by Resolution 60/251 of the United Nations General Assembly, a report drawn up by the WGAD may be one of the factors that may be taken into account in the first step of that examination. However, the executing judicial authority is not bound by the conclusions set out in that report (para 125).

- **Second step (specific and precise analysis of the individual situation of the requested person).**
  - The executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step are liable to have an impact on the proceedings to which the requested person will be subject. They must determine whether, having regard to that person's personal situation, the nature of the offence for which he or she is prosecuted and the factual context in which that arrest warrant was issued, there are substantial grounds for believing that that person will run a real risk of infringement of the fundamental right to a fair trial guaranteed by Article 47(2) Charter if he or she is surrendered to that Member State (para 106, with reference to *Openbaar Ministerie (Independence of the issuing judicial authority* and *Openbaar Ministerie* (*Tribunal established by law in the issuing Member State)*).
  - The existence of such a risk can be established only if, in the light of the rules on jurisdiction and judicial procedure applicable in the issuing Member State, the court that will likely be called upon to hear the proceedings to which that person will be subject in that Member State manifestly lacks jurisdiction (para 107).
  - A difference as to the precise scope of those rules between the judicial authorities of the issuing Member State and the judicial authorities of the executing Member State cannot validly form the basis for such a finding (para 108).
- **A refusal to execute the EAW requires that both steps be met.**
  - A finding by the executing judicial authority that there are factors demonstrating systemic or generalised deficiencies in the operation of the judicial system of the issuing Member State cannot justify that judicial authority's refusal to execute an EAW without having carried out the second step of the examination (para 110, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*.
  - If the requested person claims that he/she will be exposed to a risk of infringement of Article 47(2) Charter on the grounds that he/she will be tried by a court of the issuing Member State which does not have jurisdiction to do so, but the executing judicial authority considers that the information at its disposal does not constitute objective, reliable, specific and properly updated information to demonstrate the existence of systemic or generalised deficiencies in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which that person belongs, that authority cannot refuse to execute that EAW on the grounds alleged by that person (para 111).
  - Legal remedies in the issuing Member State, which enable a review of the jurisdiction of the court called upon to try a person after surrender, may rule out the risk of a breach.
    - If the legal system of the issuing Member State provides for such legal remedies, in the form of an examination of its own jurisdiction by that court or an action available before another court, the risk that that person may be tried by a court of that Member State which does not have jurisdiction for that purpose may, in principle, be ruled out by that person's exercise of those legal remedies (para 112).

- The exercise of such legal remedies must make it possible, provided that they are effective, to avoid the very occurrence of that infringement or, in any event, to avoid irreparable damage arising from that infringement (para 113).
- In the absence of objective, reliable, specific and properly updated information demonstrating that there are systemic or generalised deficiencies, there is, in light of the principle of mutual trust, no valid reason for the executing judicial authority to presume that the legal remedies are lacking or that they are ineffective (para 114).
- An executing judicial authority reviewing the application by the courts of the issuing Member State of their own rules on jurisdiction and judicial procedure in an individual case would run counter to the principle of mutual recognition (para 116).

Case C-699/21, *E.D.L. (Motif de refus fondé sur la maladie)*, Judgment of 18 April 2023.

- See *infra* 11 (on postponed surrender).

Case C-261/22, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, Judgment of 21 December 2023.

- ***Facts.*** A woman was convicted *in absentia* in Belgium to a custodial sentence of 5 years for the offence of trafficking in human beings and facilitating illegal immigration. A Belgian court issued an EAW for the purpose of enforcing that sentence. Some months later she was arrested in Italy. At the time of her arrest, she was pregnant and in the company of her 3-year-old son. The Italian executing authority did not receive any information from the Belgian court regarding the arrangement for enforcement, in Belgium, of sentences imposed on mothers living with their minor children and refused the surrender. The Italian Court of Cassation, before which the case was brought, asked the CJEU whether and under what conditions the executing judicial authority may refuse to execute an EAW in such a situation.
- ***Main questions.*** Must Article 1(2) and (3) and Articles 3 and 4 EAW FD be interpreted as meaning that they do not permit the executing judicial authority to refuse or in any case defer the surrender of a mother who has minor children living with her? If the answer to the first question is in the affirmative, are those provisions compatible with Articles 7 and 24(3) of the Charter, also considering the case-law of the ECtHR in relation to Article 8 ECHR and the constitutional traditions common to the Member States, in so far as they require the surrender of the mother, thus severing ties with minor children living with her without considering the best interest of the child?
- ***The CJEU's reply.*** **Article 1(2) and (3) EAW FD read in the light of Article 7 and Article 24(2) and (3) of the Charter must be interpreted as precluding the executing judicial authority from refusing to surrender the person who is the subject of an EAW on the grounds that that person is the mother of young children living with her, unless two conditions are met. First, that authority has available to it information demonstrating that there is a real risk of breach of that person's fundamental right to respect for her private and family life enshrined in Article 7 Charter and of disregard for the best interests of her children, as protected by Article 24(2) and (3) of that Charter, on account of systemic or generalised deficiencies in the detention conditions of mothers of young children and of the care of those children in the issuing Member State. Second, there are substantial grounds for believing that, in the light of their personal situation, the persons concerned will run that risk on account of those conditions.** The CJEU's main arguments follow.

- **Mutual recognition and mutual trust are the point of departure.**
  - Save in exceptional circumstances, Member States must consider all the other Member States to be complying with EU law and with the fundamental rights recognised by EU law (para 33, with reference to *Puig Gordi and Others*).
  - Save in exceptional circumstances, Member States may not check whether the other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU (para 34, with reference to *Puig Gordi and Others* and to Opinion 2/13 *(Accession of the EU to the ECHR)*).
  - Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of the EAW FD (para 36).
  - Executing judicial authorities may refuse only on grounds stemming from the EAW FD, as interpreted by the CJEU. Whilst execution of the EAW constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (para 37, with reference to *Puig Gordi and Others*).
  - The EAW FD does not provide that the executing judicial authority may refuse to execute an EAW on the sole grounds that the person who is the subject of that arrest warrant is the mother of young children living with her. [...] There is a presumption that the detention conditions of the mother of young children and of the care of those children in the issuing Member State are appropriate to such a situation, whether in prison accommodation or in the context of alternative arrangements ensuring that that mother remains available to that Member State's judicial authorities or that those children are placed outside the prison accommodation (para 38).
- **Respect for private and family life and the best interests of the child.**
  - It is apparent from Article 1(3) EAW FD that the EAW FD is not to have the effect of modifying the obligation to respect the fundamental rights guaranteed by the Charter (para 39).
  - Article 7 Charter enshrines the right of every person to respect for his or her private and family life and Article 24(2) Charter underlines that in all actions relating to children, the child's best interests must be a primary consideration (para 40).The Charter also applies to decisions, like the EAW, which are not addressed to the children, but have significant consequences for them (para 41).
  - The existence of a real risk that the requested person and/or his or her children would, if that person is surrendered to the issuing State, suffer a breach of those fundamental rights is capable of permitting the executing judicial authority to refrain, exceptionally, from giving effect to that EAW on the basis of Article 1(3) EAW FD (para 43, with reference to *Puig Gordi and Others*).
  - The assessment of the risk must be carried out by the executing judicial authority having regard to the standard of protection of fundamental rights guaranteed by EU law (para 44, with reference to *Aranyosi and Căldăraru*). Consequently, a lack of certainty on the part of that authority as regards the existence, in the issuing Member State, of conditions comparable to those existing in the executing Member State concerning the detention of mothers of young children and the care of those children is insufficient (para 44).
- **The two-step examination in relation to the fundamental right to right to private and family life.**
  - The executing judicial authority must assess whether there is a real risk of breach of the fundamental rights enshrined in Article 7 and Article 24(2) and (3) Charter in the context of a two-step examination involving an analysis on the

basis of different criteria. Those steps cannot overlap one another and must be carried out successively (para 46, with reference to *Puig Gordi and Others).*

- First step. The executing judicial authority must determine whether there is objective, reliable, specific and properly updated information to demonstrate that there is a real risk of breach, in the issuing Member State, of those fundamental rights on account of either systemic or generalised deficiencies in the detention conditions of mothers of young children or of the care of those children in the issuing Member State, or deficiencies in those conditions affecting more specifically an objectively identifiable group of persons, such as children with disabilities. That information may be obtained from, inter alia, judgments of international courts, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations, or information collected in the database of the European Union Agency for Fundamental Rights (paras 45 and 47, with reference to *Aranyosi and Căldăraru*, and *Puig Gordi and Others).*
- Second step. The executing judicial authority must determine, specifically and precisely, to what extent the deficiencies identified in the first step of the examination, are liable to have an impact on the detention conditions of the requested person or of the care of his or her children, and whether, having regard to their personal situation, there are substantial grounds for believing that that person or his or her children will run a real risk of breach of those fundamental rights (para 48, with reference to *Aranyosi and Căldăraru* and *Puig Gordi and Others).*

- **Requests for additional information and need for dialogue.**
  - If the executing judicial authority considers that it does not have access to all the information necessary for the adoption of a decision on the surrender, it must, pursuant to Article 15(2) EAW FD, request the issuing judicial authority to furnish as a matter of urgency all the supplementary information it considers necessary on the conditions under which it is intended, in that Member State, that that person will be detained and the care of that person's children will be organised (para 49, with reference to *Aranyosi and Căldăraru*).
  - The information which the executing judicial authority is entitled to request may concern both the first and the second steps of the examination. However, that authority may not request information from the issuing judicial authority concerning only the second step of that examination when it considers that the existence of deficiencies (first step) has not been established (para 50, with reference to *Puig Gordi and Others).*
  - The executing judicial authority may fix a time limit for the receipt of the supplementary information. That time limit must be adjusted to the particular case, but also take into account the need to observe the time limits set in Article 17 (para 51, with reference to *Aranyosi and Căldăraru).*
  - In light of the principle of sincere cooperation, the issuing and executing judicial authorities must enter into a dialogue and the issuing judicial authority is required to provide the executing judicial authority with the supplementary information requested (paras 52-53, with reference *Aranyosi and Căldăraru*, and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*).
  - If the issuing judicial authority does not respond in a satisfactory manner to the request for supplementary information, the executing judicial authority must then carry out an overall assessment of all the information available to it in the

context of each of the two steps (para 54, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*.

- The executing judicial authority must under Article 1(3) EAW FD refrain from giving effect to the EAW if it considers, having regard to all the information available to it, including the possible absence of assurances provided by the issuing judicial authority, that there are, first, general deficiencies and, second, substantial grounds for believing that, in the light of their personal situation, the person concerned and/or his or her children will run a real risk of breach of the fundamental rights enshrined in Article 7 and Article 24(2) and (3) of the Charter. Otherwise, it must execute that warrant, in accordance with the obligation laid down in Article 1(2) EAW FD (para 55).

Case C-318/24 PPU, *Breian*, Judgment of 29 July 2024.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling by an issuing judicial authority) and 4 (on the possibility to issue several successive EAWs and obligation to decide on the execution of the EAW) and *infra* 10 (on requests for additional information).
- ***Facts.*** Romanian authorities issued an EAW for the purposes of executing a custodial sentence. The convicted person was detained in France. The competent French court refused surrender to Romania. It found that the Romanian judicial system suffers from systemic deficiencies which, in the present case, had manifested themselves in particular in the fact that one of the judges involved in the conviction had taken an oath of office only as a public prosecutor and it could not be proved that another judge involved in the case had taken the oath. It was therefore considered to be a real risk that the conviction was not handed down in a fair hearing by an independent and impartial tribunal previously established by law. Subsequently, the convicted person was arrested in Malta on the basis of the same EAW. The Maltese executing judicial authority requested additional information from the Romanian court and stated that the requested person was relying on the decision of the French executing judicial authority. The Romanian court which is responsible for enforcing the prison sentence made a request for a preliminary ruling to the CJEU in order to clarify the impact of the refusal decision on the EAW and other related questions. After the referral, a first instance Maltese court refused to execute the EAW due to doubts concerning the detention conditions in Romania. Therefore, the Romanian court referred an additional question to the CJEU on the cooperation with the Maltese court and the standard of protection of fundamental rights.
- ***Main questions.*** May an executing judicial authority refuse to execute an EAW where irregularities have been found regarding the taking of an oath by members of the adjudicating panel of the court which delivered the conviction? May an executing judicial authority refuse to execute an EAW where Interpol had deleted from the Interpol database an international wanted persons notice on the grounds that the requested person's data did not comply with Interpol's data processing rules? Can the executing judicial authority refuse to execute the EAW on the basis of information which has not been brought to the attention of the issuing judicial authority and in respect of which the latter has not had the opportunity to provide supplementary information? Can the executing judicial authority apply a higher standard than that provided for by the Charter? Can a judicial authorities of the issuing Member State participate directly in the judicial proceedings for the execution of the EAW conducted by the executing judicial authority?
- ***The CJEU's replies.*** **The executing judicial authority cannot refuse to execute an EAW on the grounds that the record of the oath taken by one of the judges who imposed that sentence cannot be found, or that another judge of the same formation has taken an oath only as a public prosecutor. The existence of a decision of the Commission for the Control of Interpol's Files (CCF) concerning that person's situation cannot, in itself, justify a refusal by the executing judicial authority to execute that arrest warrant. However, such**

a decision may be taken into account by that judicial authority in its assessment. When examining detention conditions in the issuing Member State, the executing judicial authority cannot refuse to execute an EAW on the basis of information concerning the detention in the issuing Member State which it has obtained itself, and in respect of which it has not requested supplementary information from the issuing judicial authority. The executing judicial authority cannot apply a higher standard as regards detention conditions than that guaranteed by Article 4 Charter. The issuing judicial authority does not have the right to participate, as a party, in the proceedings for the execution of that arrest warrant before the executing judicial authority. The CJEU's main arguments follow.

- **A CCF decision cannot justify a refusal to execute the EAW**
  - The principles set out by the CJEU in earlier case-law when discussing a report by the Working Group on Arbitrary Detention, a body operating under the supervision of the United Nations Human Rights Council, are applicable *mutatis mutandis* (para 58, with reference to *Puig Gordi and Others*).
  - A CCF decision is one of the factors that an executing authority can consider in the second step of the two-step examination, but they are not bound by it (para 60).
- **The fact that the record of the oath taken by one of the judges who imposed the sentence mentioned in the EAW cannot be found, or that another judge has taken an oath only as a public prosecutor, cannot justify a refusal to execute the EAW.**
  - Under the principle of mutual trust, there is a presumption that all Member States are complying with EU law and particularly with the fundamental rights recognised by EU law (paras 73-74, with reference to *Puig Gordi and Others*).
  - Execution of EAWs constitutes the rule; refusal to execute is intended to be an exception which must be interpreted strictly (paras 72 and 75, with reference to *GN (Ground for refusal based on the best interests of the child)*).
  - Subject to a two-step examination, an executing judicial authority can, exceptionally, refrain from giving effect to an EAW on the basis of Article 1(3) EAW FD (paras 76-79, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - Among the requirements inherent in the fundamental right to a fair trial (Article 47(2) Charter), is the right of every person to be heard by an independent and impartial tribunal previously established by law. Those requirements encompass, by their very nature, not only the judicial appointment procedure, but also the conditions under which judges take up office (para 80).
  - However, not every error that takes place during the procedure for the appointment of a judge, or when a judge takes up office, is of such a nature as to cast doubt on the independence and impartiality of that judge and, accordingly, on whether a formation which includes that judge can be considered to be an 'independent and impartial tribunal previously established by law' within the meaning of EU law (para 82).
  - It follows from the ECtHR case-law that only those breaches that relate to the fundamental rules on the procedure for appointing judges and for judges to take up office infringe Article 6(1) ECHR (para 83).
  - The fact that under domestic law a public prosecutor who has taken the oath on taking up office does not have to re-take the oath in the event of subsequently taking up the office of judge cannot constitute a systemic or generalised deficiency as regards the independence of the judiciary for the purposes of the CJEU's case-law (para 84). It is not capable of giving rise to doubt as to the propriety of the appointment of judges and, consequently, as to their independence and impartiality (para 85).

- Uncertainty as to the place where the records of the oath taken by the judges of a Member State are kept or the fact that those records cannot be located are not, in and of themselves, enough to establish that the judges concerned were performing their duties without ever having taken the required oath (para 86). In any event, such uncertainty cannot be regarded as constituting a systemic or generalised deficiency as regards the independence of the judiciary in that Member State if national law provides effective legal remedies (para 87).

- **An executing judicial authority cannot refuse to execute an EAW on the basis of detention conditions without having first requested additional information and must rely on an assurance given by the issuing judicial authority.**
  - The executing judicial authority has an obligation to bring the surrender procedure to an end where surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 Charter (para 101, with reference to *Dorobantu*).
  - Such a decision is subject to a two-step assessment (paras 102-105, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*.
  - Before concluding on the existence of a real risk, the executing judicial authority must submit a request for information to the issuing judicial authority and the issuing judicial authority is obliged to provide that information (paras 106-107, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary* and para 112).
  - Upon receipt of that information, the executing judicial authority can reach any of the following conclusions (paras 108-109).
    - There is a real risk for the individual concerned. The executing judicial authority must then postpone the execution of the EAW, without, however, abandoning it.
    - There is no real risk for the individual concerned. The executing judicial authority must adopt its decision on the execution of the EAW.
    - The information is insufficient to conclude on the existence of a real risk. The executing judicial authority must request the necessary supplementary information as a matter of urgency. In addition, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority.
  - In accordance with Article 15 EAW FD, 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 (para 111, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*.
  - The assurance provided by the competent authorities of the issuing Member State is a factor which the executing judicial authority cannot disregard (para 114, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*. When that assurance has been given, or at least endorsed, by the issuing judicial authority, the executing judicial authority, in view of the principle of mutual trust, 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 115, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*.
  - The executing judicial authority cannot disregard information provided by the issuing judicial authority solely on the basis of information which the executing judicial authority obtained from publicly available sources, without requesting supplementary information from the issuing judicial authority (para 116).

- An issuing court's acceptance of an assurance must be sufficiently clear but does not require the use of a particular term or phrase (para 117).
- The mere absence of a 'precise plan for ... execution of the sentence' or 'precise criteria for determining a particular regime of execution' does not fall within the concept of 'inhuman or degrading treatment' within the meaning of Article 4 Charter (para 118). An executing judicial authority cannot demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law (para 118, with reference to *Dorobantu*).

- **An issuing judicial authority does not have the right to participate, as a party, in the EAW proceedings before the executing judicial authority.**
  - None of the provisions of the EAW FD provide that the judicial authority issuing an EAW must participate directly in the proceedings for the execution of that arrest warrant before the executing judicial authority (para 90). The EAW FD does not preclude such participation, which may be provided by the domestic procedural rules of the executing State (para 91).
  - The principles of mutual recognition and sincere cooperation do not require such participation to be made obligatory (para 90). Based on these principles, the issuing and executing judicial authorities must enter into a dialogue and make full use of the instruments provided for in Articles 8(1) and 15 EAW FD in order to foster the mutual trust on which the cooperation in criminal matters is based (paras 92-94, with reference to *Puig Gordi and Others*).

Case C-202/24, *Alchaster*, Judgment of 29 July 2024.

- ***Facts.*** A district judge of the Magistrates' Courts of Northern Ireland (United Kingdom) issued four arrest warrants (AW) against a person suspected of having committed terrorist offences, allegedly between 18 and 20 July 2020, some of which may justify the imposition of a life prison sentence. In his appeal to the Supreme Court of Ireland, the requested person claimed that his surrender under the TCA would be incompatible with the principle that offences and penalties must be defined by law, because of an unfavourable change to the rules on release on licence adopted by the United Kingdom after the suspected commission of the offences in question.[6] The Supreme Court of Ireland states that the Supreme Court of the United Kingdom has already concluded that those rules are compatible with the ECHR and that, in that context, the Supreme Court of Ireland has already rejected the argument of the requested person concerning a risk of violation of the ECHR. Asking whether the same conclusion could be drawn in respect of the principle that offences and penalties must be defined by law, enshrined in the Charter, it referred a question to the CJEU on that point.
- ***Main question.*** Must the TCA, read in conjunction with Article 49(1) Charter, be interpreted as meaning that the executing judicial authority must assess the existence of a risk of a breach of Article 49(1) in the event of surrender to the United Kingdom before deciding on the execution of that AW, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the ECtHR?

[6] See para 25 of the judgment. The regime permitting release on licence in Northern Ireland was amended with effect from 30 April 2021. Before that amendment, a person convicted of certain terrorist offences could be granted automatic release on licence after serving half of his or her sentence. Under the regime in force from that date, the release on licence of such a person must be approved by a specialised authority and may take place only after that person has served two thirds of his or her sentence.

- ***The CJEU's reply*. Article 524(2) and Article 604(c) TCA, read in conjunction with Article 49(1) Charter must be interpreted as meaning that, where a person who is the subject of an AW issued on the basis of the TCA invokes a risk of a breach of Article 49(1) in the event of surrender to the United Kingdom, on account of a change, which is unfavourable to that person, in the conditions for release on licence, which occurred after the alleged commission of the offence for which that person is being prosecuted, the executing judicial authority must undertake an independent examination as to the existence of that risk before deciding on the execution of that AW, in a situation where that judicial authority has already ruled out the risk of a breach of Article 7 ECHR, by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for that person to bring an action before the ECtHR. Following that examination, that executing judicial authority will have to refuse to execute that AW only if, after requesting additional information and guarantees from the issuing judicial authority, it has objective, reliable, specific and properly updated information establishing that there is a real risk of a change to the actual scope of the penalty provided for on the day on which the offence at issue was committed, involving the imposition of a heavier penalty than the one that was initially provided for.** The CJEU's main arguments follow.
  - An executing judicial authority is in principle required to give effect to an AW and may refuse to execute it only for reasons arising from the TCA (paras 46 and 48, with reference, by analogy, to *Sofiyska gradska prokuratura and Others (Successive arrest warrants)*).
  - Pursuant to Article 524(2) TCA, no provision of Part Three of the TCA alters the obligation to respect fundamental rights and legal principles as set out in the ECHR and, in the case of the EU and its Member States, in the Charter. The obligation to comply with the Charter is binding on the Member States when they decide on the surrender of a person to the United Kingdom (paras 48-49).
  - Those rights include, in particular, the rights arising from Article 49(1) Charter, which states, *inter alia*, that no heavier penalty is to be imposed than that which was applicable at the time the criminal offence was committed (para 50).
  - The existence of a risk of a breach of those rights permits the executing judicial authority to refrain, following an appropriate examination, from giving effect to an AW on the basis of the TCA (para 51, with reference, by analogy, to *Minister for Justice and Equality (Deficiencies in the system of justice), Puig Gordi and Others, GN (Ground for refusal based on the best interests of the child)*.
  - The executing judicial authorities of the Member States are therefore required, when adopting their decision, to ensure respect for the fundamental rights afforded by the Charter to the person who is the subject of an AW, without the fact that the Charter is not applicable to the United Kingdom being relevant in that regard (para 49, with reference, by analogy, to *Petruhhin*).
  - The two-step examination, that applies in the context of the EAW FD, cannot be transposed to the assessment of the risk of a breach of Article 49(1) Charter during the procedure for the execution of an AW issued on the basis of the TCA (para 55).
    - The EAW FD has as its basis the high level of trust which must exist between the Member States and the principle of mutual recognition which constitutes the cornerstone of judicial cooperation between Member States in criminal matters (para 56, with reference to *Minister for Justice and Equality (Deficiencies in the system of justice), GN (Ground for refusal based on the best interests of the child)*).
    - The obligation under the EAW FD to find that there are generic deficiencies (i.e. first step of the two-step assessment) before being able to verify, specifically and precisely, whether the person who is the subject of an EAW runs a real risk of breaching a fundamental right (i.e. second step of the two-step assessment) is

precisely aimed at preventing such an investigation from being conducted outside exceptional cases and is thus the consequence of the presumption of respect for fundamental rights by the issuing Member State which stems from the principle of mutual trust (para 59, with reference to *Puig Gordi and Others).*

- It cannot be ruled out that an international agreement may establish a high level of confidence between the Member States and certain third countries (para 65). This applies, for example, to certain European Economic Area (EEA) States, such as Norway (paras 66-68), which have a special relationship with the EU, but it cannot be extended to all other third countries (para 69), such as the United Kingdom (paras 70-78).
- The United Kingdom is not part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust (para 70).
- Although it is apparent from the wording of Article 524(1) TCA that cooperation between the United Kingdom and the Member States is based on long-standing respect for the protection of the fundamental rights and freedoms of individuals, that cooperation is not presented as being based on the preservation of mutual trust between the States concerned which existed before the United Kingdom left the EU on 31 January 2020 (para 71).
- There are substantial differences between the provisions of the TCA relating to the surrender mechanism established by that agreement and the corresponding provisions of the EAW FD (paras 72-74). Article 604(c) TCA is particularly relevant in this regard (para 75).

- The assessment to be made to determine whether the person is exposed to a real risk of a breach of Article 49(1) Charter is as follows.
  - The executing judicial authority must have – with regard to the individual situation of the requested person – objective, reliable, specific and properly updated information establishing substantial grounds for believing that there is a real risk of a breach (para 85).
    - The fact that the executing judicial authority has already ruled out the risk of a breach of Article 7 ECHR, by relying on the guarantees offered generally by the United Kingdom as regards compliance with the ECHR and on the possibility for the requested person to bring an action before the ECtHR cannot, in itself, be decisive (para 81).
    - Articles 524(2) and 604(c) TCA, read in conjunction with Article 49(1) Charter, require the executing judicial authority to examine all the relevant factors in order to assess the foreseeable situation of the requested person after surrender. Unlike the two-step examination, this assumes that both the rules and practices that are generally in place in that country and the specific features of that person's individual situation are to be taken into account simultaneously (para 82).
    - The possible finding of a real risk, if the requested person is surrendered to the United Kingdom, of a breach of Article 49(1) Charter must have sufficient factual basis (para 84, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
  - The executing judicial authority can refuse only if they requested additional guarantees, but did not obtain sufficient guarantees to rule out the risk (para 85).
    - Article 613(2) TCA provides that, if the executing judicial authority finds the information communicated by the issuing State insufficient, it must

request that the necessary supplementary information be furnished as a matter of urgency (para 87).

- In accordance with Article 604(c) TCA, it is for the executing judicial authority to request the grant of additional guarantees where it considers that there are valid reasons to believe that there is a real risk of a breach of Article 49(1) Charter (para 90).

- A measure relating to the execution of a sentence will be incompatible with Article 49(1) Charter only if it retroactively alters the actual scope of the penalty provided for on the day on which the offence at issue was committed, thus entailing the imposition of a heavier penalty than the one initially provided for. Although that is not, in any event, the case where that measure merely delays the eligibility threshold for release on licence, the position may be different, in particular, if that measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for (paras 92-97, with reference to relevant case-law from the ECtHR).

7. Refusal grounds

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

With respect to grounds for optional non-execution under Article 4 EAW FD, the CJEU has clarified that Member States are free to transpose them into their national law or not. However, when they do so, the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute an EAW, having the opportunity to take into account the circumstances specific to each case (*X (Mandat d'arrêt européen – Ne bis in idem)*).

So far, the CJEU has provided interpretation with regard to the following refusal grounds: minors (*Piotrowski*), national residents and persons staying in the executing Member State (*Kozłowski; Wolzenburg; Lopes Da Silva Jorge; Popławski I; Sut; Popławski II; (O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*), *ne bis in idem* (*Mantello; AY; X (Mandat d'arrêt européen – Ne bis in idem); AB and Others (Révocation d'une amnistie); Juan*), extraterritoriality (*Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)*), *in absentia* judgments (*IB; Melloni; Dworzecki; Tupikas; Zdziaszek; Ardic; Generalstaatsanwaltschaft Hamburg; Minister for Justice and Equality (Levée du sursis)*) and dual criminality (*A; X (European arrest warrant – Double criminality)*; *Procureur général près la cour d'appel d'Angers*). 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*).

The CJEU also ruled that an executing authority is not entitled to refuse the execution of an arrest warrant solely on the grounds that another State has refused to execute a first arrest warrant issued against the same person and for the same acts (*Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs)*, *Breian*, see *supra* Sections 4 and 6).

7.1. Minors

In relation to this refusal ground, the CJEU clarified that, 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. There is no need 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 (*Piotrowski*).

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

- ***Facts.*** In 2014, a Polish court issued an EAW against Piotrowski, a Polish national residing in Belgium, with a view to his surrender to the Polish authorities for the execution of the sentences imposed by two judgments (one of 2011 and one of 2012). In 2016, the investigating judge of the Belgian court ordered that Piotrowski be detained with a view to his surrender to Poland for the purpose of the execution of the judgment of 2012. In that order, the investigating judge took the view that the EAW issued by the Polish court could not be executed insofar as the judgment of 2011 was concerned because Piotrowski was 17 years old when he committed the offence. The competent Belgian public prosecutor appealed against that order, as a minor over the age of 16 may be the subject of an EAW issued by the Belgian authorities if the Juvenile Court has declined to hear the case, pursuant to the Belgian law on youth protection.
- ***Main questions.*** Must Article 3(3) EAW FD be interpreted as meaning that surrender can be granted only in respect of persons who are regarded as having attained the age of majority under the law of the executing Member State, or does that provision allow the executing Member State also to grant the surrender of minors who, on the basis of national rules, can be held criminally responsible from a certain age and subject to certain conditions?
- ***The CJEU's reply.*** **Article 3(3) EAW FD is to be interpreted as meaning that the judicial authority of the executing Member State must refuse to surrender only those minors who are the subject of an EAW and who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based. To decide whether a minor is to be surrendered, the executing judicial authority must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State, without having to consider any additional conditions, relating to an assessment based on the circumstances of the individual, to which the prosecution and conviction of a minor are specifically subject under the law of that Member State.** The CJEU's main arguments follow.
  - **The wording of Article 3(3) EAW FD.** The ground for non-execution laid down in that provision does not cover minors in general but refers only to those who have not reached the age required, under the law of the executing Member State, to be regarded as criminally responsible for the acts on which the EAW issued against them is based (para 29).
  - **The purpose of Article 3(3) EAW FD.** The EU legislature intended to exclude from surrender not all minors but only those persons who, on account of their age, cannot be the subject of any criminal prosecution or conviction in the executing Member State in respect of the acts in question, giving that Member State, in the absence of harmonisation in this field, the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible for such acts (para 30).
  - **The context and overall scheme of Article 3(3) EAW FD and the objective pursued by the EAW FD.** The refusal to execute an EAW is intended to be an exception which must be interpreted strictly (para 48). Article 3(3) EAW FD cannot be interpreted as enabling the executing judicial authority to refuse to give effect to such a warrant on the basis of an analysis for which no express provision is made (para 51). Moreover, such an analysis would in fact amount to a substantive re-examination of an analysis previously conducted in the issuing Member State and would infringe and render ineffective the principle of mutual recognition (para 52). The objective of the EAW FD was to establish a simplified and more efficient system for the surrender of persons which implies, inter alia, that Member States are required to comply with the time limits for adopting decisions relating to an EAW (Article 17 EAW FD) (paras 55 and 56) and that recourse to Article 15 EAW FD (requests for necessary, supplementary information) may be had only as a last resort in exceptional cases (para 61).

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

The rulings summarised under the present chapter relate to the application of Article 4(6) EAW FD. This provision allows the executing judicial authority to refuse to execute an EAW if it has been issued for the purposes of the execution of a custodial sentence or detention order where the requested person is staying in, or is a national or a resident of, the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. The CJEU clarified that a Member State cannot exclude, absolutely and automatically, third-country nationals staying or resident in their territory from benefitting from such ground for non-execution *(O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers))*. The CJEU held that the terms 'resident' and 'staying in' are autonomous concepts of EU law (*Kozłowski*; *Wolzenburg*). It also clarified the margin of discretion for national authorities and explained which criteria the authorities must take into consideration for the interpretation of these terms and for deciding whether or not to refuse surrender in light of its objective of facilitating social reintegration (*O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*). The CJEU further held that Article 4(6) EAW FD presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person. The mere fact that a Member State declares itself 'willing' to execute the sentence cannot be regarded as justifying such a refusal (*Popławski I*; *Popławski II*). The fact that the offence on which the EAW is based is, under the law of the executing Member State, punishable by fine only is not an obstacle, provided that that fact does not prevent the custodial sentence imposed on the requested person from being enforced (*Sut*). The CJEU also clarified that Article 4(6) EAW FD should be interpreted in the light of the principle of non-discrimination on the basis of nationality (Article 18 TFEU) (*Lopes Da Silva Jorge*).

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

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

concepts of EU law that must be given a uniform interpretation throughout the EU (paras 41–43).

- **Meaning of 'resident'.** The requested person is 'resident' in the executing Member State when the requested person has established their actual place of residence there (para 46).
- **Meaning of 'staying'.** The requested person is 'staying' in the executing Member State when, following a stable period of presence in that Member State, the requested person has acquired certain connections with that Member State which are of a similar degree to those resulting from residence. To ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying', it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of the person's presence and the family and economic connections which that person has with the executing Member State (paras 46–49). The fact that the person systematically commits crimes in the executing Member State and the fact that the person is in detention there serving a custodial sentence are not relevant factors for the executing judicial authority when it initially has to ascertain whether the person concerned is 'staying' within the meaning of Article 4(6) EAW FD (para 51). By contrast, such factors may, supposing that the person concerned is 'staying' in the executing Member State, be of some relevance for the assessment which the executing judicial authority is then called on to carry out to decide whether there are grounds for not implementing an EAW (para 51).

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

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

- **The requirement of a lawful residence for a continuous period of 5 years for non-nationals is compatible** because it pursues a legitimate objective – reintegration in society (paras 67 and 68) and is proportionate (paras 69–73).
- **Supplementary administrative formalities, such as, in particular, a residence permit of indefinite duration, are not compatible.**
  - Article 19 of Directive 2004/38 does not require EU citizens who have acquired a right of permanent residence in another Member State to hold a residence permit of indefinite duration (para 50).
  - A residence permit has only declaratory and probative force and does not give rise to any right (para 51).

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

- ***Facts.*** In 2006, a Portuguese court issued an EAW against Lopes Da Silva Jorge, a Portuguese citizen, for the execution of a 5 years' imprisonment sentence. Subsequently, Lopes Da Silva Jorge moved to France, where, after a few years, he married a French national with whom he has been resident in French territory ever since. He was also employed as a long-distance lorry driver in France under an open-ended contract. In 2010, a French court proceeded to give effect to the EAW. Lopes Da Silva Jorge asked the French court not to execute the EAW and to order his sentence of imprisonment to be served in France. However, the French court noted that Article 695–24 of the French Code of Criminal Procedure, which implements Article 4(6) EAW FD, applies only to French nationals, and therefore decided to refer the case to the CJEU.
- ***Main questions.*** What is the margin of discretion left to Member States when implementing Article 4(6) EAW FD? Is Article 695–24 of the French Code of Criminal Procedure compatible with the principle of non-discrimination on grounds of nationality (Article 18 TFEU)?
- ***CJEU's reply.*** **Article 4(6) EAW FD must be interpreted as meaning that, although a Member State may decide to limit the situations in which an executing judicial authority may refuse to surrender a person who falls within the scope of that provision, it cannot automatically and absolutely exclude from its scope the nationals of other Member States staying or resident in its territory irrespective of their connections with it. The national court is required, taking into consideration the whole body of domestic law and applying the interpretative methods recognised by it, to interpret that law, so far as possible, in the light of the wording and the purpose of the EAW FD, with a view to ensuring that that framework decision is fully effective and to achieving an outcome consistent with the objective pursued by it.** The CJEU's main arguments follow.
  - **An automatic and absolute exclusion of nationals of other Member States residing or staying in its territory, irrespective of their connections with it, is not allowed.**
    - Member States have a certain margin of discretion when implementing Article 4(6) EAW FD (para 33).
    - However, the terms 'resident' and 'staying' are autonomous concepts of EU law and thus the margin of discretion is subject to limits (paras 35–39).
      - Member States cannot give those terms a broader meaning than that which derives from a uniform interpretation.
      - Member States must give those terms a meaning that complies with Article 18 TFEU.
        - Member States must take into account the social reintegration objective of Article 4(6) EAW FD (paras 32 and 40), meaning that nationals and nationals of another Member State that are integrated into the society should, as a rule, not be treated differently (para 40).

- The alleged impossibility, in the Member State of execution, of enforcing a custodial sentence imposed in another Member State on a non-French national cannot justify the difference in treatment between such a national and a French national arising from the fact that the ground for optional non-execution laid down in Article 4(6) EAW FD is reserved exclusively to French nationals (para 49).

- **Obligation to interpret, so far as possible, the whole body of domestic national law in the light of the wording and purpose of the EAW FD.**
  - The obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU because it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (paras 53 and 54, with reference to *Pupino* and other case-law).
  - Limitations to this duty: general principles of law and no interpretation of national law *contra legem* (paras 55–57).

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

- ***Facts.*** In 2007, a Polish court gave Popławski, a Polish national, a 1-year suspended prison sentence. In 2010, the Polish court ordered the enforcement of that custodial sentence. In 2013, an EAW was issued with a view to enforcement of that sentence. By that time, Popławski had become a 'resident' in the Netherlands within the meaning of Article 4(6) EAW FD. Article 4(6) EAW FD has been transposed in Dutch law in Article 6 of the Dutch Surrender of Persons Act (*Overleveringswet*, hereinafter OLW). The District Court of Amsterdam considered applying this ground for non-execution but had doubts whether Article 6(2) to (4) OLW was compatible with Article 4(6) EAW FD. The District Court noted that, under the OLW, an executing judicial authority is obliged to refuse surrender for purposes of executing a sentence of a national or resident of the executing Member State. That refusal gives rise to a mere 'willingness' to take over the execution of the custodial sentence. A positive decision is dependent on the application of the Convention on the Transfer of Sentenced Persons or another applicable convention. This requires Poland to make a request. However, Polish legislation precludes such a request in situations where the person concerned is a Polish national. Under the OLW, there is a risk that, following refusal of surrender for purposes of executing the sentence, the executing Member State cannot take over the execution of that sentence, while that risk does not affect the obligation to refuse surrender.
- ***Main questions.*** May a Member State transpose Article 4(6) EAW FD in a way that, on the one hand, it includes an obligation to refuse to surrender, but, on the other, it makes the final decision to take over the sentence dependent on the fulfilment of some conditions (particularly a basis for that decision in a treaty or convention)? Can the national courts apply the provisions of the EAW FD directly, and, in the case of an affirmative answer, is Article 4(6) sufficiently precise and unconditional? May a Member State whose national law requires that the taking over of the execution of the foreign custodial sentence must be based on an appropriate treaty or convention transpose Article 4(6) in its national law in such a way that that provision itself provides the required conventional basis? May a Member State transpose Article 4(6) in such a way that, for refusal of surrender for purposes of executing a sentence in respect of a resident, it sets the condition that the executing Member State must have jurisdiction in respect of the offences cited in the EAW and that there must be no actual obstacles in the way of a criminal prosecution in the executing Member State of that resident in respect of those offences, whereas it does not set such a condition in respect of nationals of the executing Member State?
- ***CJEU's reply.*** **Article 4(6) EAW FD precludes legislation of a Member State implementing that provision which, first, does not authorise such a surrender and, second, merely lays**

down the obligation for the judicial authorities of the first Member State to inform the judicial authorities of the second Member State that they are willing to take over the enforcement of the judgment where, on the date of the refusal to surrender, the execution has not in fact been taken over and where, furthermore, in the event that taking over that execution subsequently proves to be impossible, such a refusal may not be challenged. The provisions of the EAW FD do not have direct effect. However, the competent national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, is obliged to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of that framework decision. Article 4(6) EAW FD does not authorise a Member State to refuse to execute an EAW, issued with a view to the surrender of a person who has been finally judged and given a custodial sentence, on the sole ground that that Member State intends to prosecute that person in relation to the same acts as those for which that judgment was pronounced. The CJEU's main arguments follow.

- **A national legislation which obliges the executing authority to refuse the surrender of a resident without those authorities having any margin of discretion, and without that Member State actually undertaking to execute the custodial sentence, cannot be regarded as compatible with the EAW FD.**
  - The execution of the EAW constitutes the rule and refusals to execute are exceptions, which must be interpreted strictly (para 19).
  - Article 4(6) provides that the executing judicial authority 'may' refuse to execute an EAW if that Member State 'undertakes' to enforce that sentence in accordance with its domestic law (para 20).
  - The executing judicial authority must have a margin of discretion whether or not it is appropriate to refuse to execute the EAW, taking into account the objective of that ground for optional non-execution (the possibility of increasing the requested person's chances of reintegration into society) (para 21).
  - Any refusal to execute an EAW presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence; the mere fact that the Member State declares itself 'willing' to execute the sentence cannot be regarded as justifying such a refusal (para 22).
- **The provisions of the EAW FD do not have direct effect** (paras 26 and 27).
- **The competent national court is obliged to interpret the provisions of national law, so far as is possible, in the light of the wording and purpose of the EAW FD.**
  - This obligation to interpret national law in conformity with EU law is inherent in the system of the TFEU because it permits national courts, for matters within their jurisdiction, to ensure the effectiveness of EU law (para 31, with reference to *Ognyanov* and other case-law).
  - Limitations to this duty: general principles of law and no interpretation of national law *contra legem* (paras 32 and 33).
  - The obligation to interpret domestic law in conformity with EU law requires national courts to change established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of the EAW FD, and national courts must, where necessary, disapply, on their own authority, the interpretation adopted by the national supreme court if that interpretation is incompatible with EU law (paras 35 and 36, with reference to *Ognyanov*).
  - It is for the referring court alone to assess whether Dutch law, and particularly the requirement of 'a treaty or another applicable convention', may be interpreted to the effect that it puts the EAW FD on the same footing as the formal legal basis required by Article 6(3) OLW (para 39).

- However, the CJEU may provide guidance (para 40) and holds that, in the light of the EAW FD, it is not inconceivable that the EAW FD could be placed on the same footing as such a convention (paras 41 and 42).
- In the present case, the duty to interpret the domestic law in the light of the wording and purpose of the EAW FD means that, in the event of a refusal to execute the EAW, the judicial authorities of the executing Member States are themselves required to ensure that the sentence pronounced against that person is actually executed (para 43).

- **Article 4(6) does not authorise a Member State to refuse to execute an EAW issued with a view to the surrender of a person who has been judged and given a custodial sentence on the sole ground that that Member State intends to prosecute that person in relation to the same acts** (para 48).
  - Article 4(6) makes no mention whatsoever of a possibility for the executing authority to refuse to execute an EAW in the event that a fresh prosecution for the same acts may be brought against that person on its territory (para 45).
  - Such an interpretation would be inconsistent with Article 50 Charter (para 46).

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

- ***Facts.*** In 2011, a Romanian court issued an EAW against Sut, a Romanian citizen, for the execution of a custodial sentence of 1 year and 2 months. In 2015, Sut moved to Belgium, where he lived and worked with his spouse on a self-employment basis. In 2017, when the Belgian court ordered the execution of the EAW, Sut brought an appeal against such order. Sut was residing in Belgium and he had economic and family ties there. However, the Belgian court was hesitant about refusing the EAW on the basis of Article 6(4) of the Belgian Law on the EAW, which transposes Article 4(6) EAW FD. The offences for which the Romanian court imposed a custodial sentence are punishable in Belgium by fines only. Moreover, although Belgian Law provides for the possibility of adapting a sentence if its length or nature is incompatible with Belgian law, it expressly prohibits the conversion of a custodial sentence into a fine.
- ***Main question.*** Can Article 4(6) EAW FD be interpreted as being inapplicable to acts for which a custodial sentence has been imposed by a court of an issuing Member State when those same acts are punishable in the territory of the executing Member State only by a fine, which means, in accordance with the domestic law of the executing Member State, that the custodial sentence cannot be executed in the executing Member State, which would be to the detriment of the social rehabilitation of the person sentenced and of the person's family, social, economic and other ties?
- ***CJEU's reply.*** **Article 4(6) EAW FD must be interpreted as meaning that, where, as in the case in the main proceedings, a person who is the subject of an EAW issued for the purposes of enforcing a custodial sentence resides in the executing Member State and has family, social and working ties in that Member State, the executing judicial authority may, for reasons related to the social rehabilitation of that person, refuse to execute that warrant, despite the fact that the offence which provides the basis for that warrant is, under that national law of the executing Member State, punishable by fine only, provided that, in accordance with its national law, that fact does not prevent the custodial sentence imposed on the person requested from actually being enforced in that Member State, which is for the referring court to ascertain.** The CJEU's main arguments follow.
  - **The application of Article 4(6) EAW FD requires the following.**
    - The requested person is a national or a resident, or has to be 'staying' in the executing Member State (para 34, with reference to *Kozłowski*).
    - The executing Member State has to undertake to enforce the sentence or detention order in accordance with its domestic law. If the executing Member

State finds that it is in fact impossible to undertake to enforce the sentence, it falls to the executing judicial authority to execute the EAW and, therefore, to surrender the requested person to the issuing Member State (para 35, with reference to *Popławski I*).
    - There is a legitimate interest, for reasons related to the social reintegration of that person, that would justify the sentence being enforced on the territory of the executing Member State (para 36, with reference to *Kozłowski*).
  - **It is for the executing judicial authority to satisfy itself that its law allows the custodial sentence imposed in the issuing Member State on the requested person actually to be enforced** (para 49).
    - Article 4(6) EAW FD does not give any indication from which the second condition stated in that provision could be interpreted as automatically precluding a judicial authority of the executing Member State from refusing to execute an EAW where the law of that Member State provides only for a fine in response to the offence to which the warrant relates (para 41).
    - When transposing Article 4 EAW FD into domestic law, the Member States have, of necessity, a certain margin of discretion (para 42).
    - A risk of the requested person going unpunished must be avoided (para 47).
    - No provision of Framework Decision 2008/909 (FD 2008/909) can affect the scope of the ground for optional non-execution of Article 4(6) EAW FD or the way in which it is applied (para 48).

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

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

was adopted, which is not in line with the wording of Article 28(2) FD 2008/909. Therefore, the validity of the transitional provision could be questioned.

- ***Main questions.*** Does the principle of primacy of EU law impose an obligation on a Member State to disapply a provision of the law of that Member State that is incompatible with the provisions of a framework decision? Is a declaration made by a Member State pursuant to Article 28(2) FD 2008/909 after the framework decision was adopted capable of producing legal effects?
- ***CJEU's reply.*** **Article 28(2) FD 2008/909 must be interpreted as meaning that a declaration made pursuant to that provision by a Member State after that framework decision was adopted is not capable of producing legal effects. The principle of primacy of EU law does not require a national court to disapply a provision of national law that is incompatible with the provisions of a framework decision. The authorities of the Member States are nevertheless required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by the framework decision concerned.** The CJEU's main arguments follow.
  - **A declaration made pursuant to Article 28(2) FD 2008/909 by a Member State after that framework decision was adopted is not capable of producing legal effect.**
    - Article 28(2) FD 2008/909 derogates from the general arrangements laid down in Article 28(1); therefore, it requires strict interpretation (para 45).
    - The wording of Article 28(2) is quite clear: 'any Member State may, on the adoption of this Framework Decision, make a declaration'. Consequently, a declaration made after that date does not satisfy these conditions and therefore does not produce legal effects (para 46).
    - The general scheme of FD 2008/909 also confirms this interpretation; whenever a declaration is allowed to be made after the adoption date, such a power is expressly laid down in the relevant provision (e.g. Articles 4(7), 7(4) FD 2008/909) (para 47).
    - The mere fact that a Member State expresses its intention to make a declaration according to Article 28(2) is not sufficient to be regarded as a declaration pursuant to Article 28(2) (para 48).
  - **The principle of primacy of EU law does not require a national court to disapply a provision of national law that is contrary to the provisions of a framework decision.**
    - A national court's obligation to disapply a provision of its national law that is contrary to a provision of EU law is dependent on the direct effect of that provision in the dispute pending before that court (para 68).
    - Framework decisions do not have direct effect; they are binding on the Member States only as to the result to be achieved and leave to the national authorities the choice of form and methods (Article 34(2)(b) of the former TEU; para 69, with reference to *Ognyanov* and *Popławski I*).
    - Because the EAW FD and FD 2008/909 have not been subject to any repeal, annulment or amendment, they continue to have the legal effect attributed to them under Article 34(2)(b) of the former TEU because the legal effects of any framework decision are preserved in accordance with Article 9 of Protocol (No 36) on transitional provisions, annexed to the treaties (para 70, with reference to *Ognyanov*).
  - **The authorities of the Member States are required to interpret their national law, to the greatest extent possible, in conformity with EU law to ensure an outcome that is compatible with the objective pursued by the framework decisions concerned.**

- The whole body of domestic law has to be taken into consideration and the interpretative methods recognised by domestic law have to be applied, with a view to ensuring that the framework decision concerned is fully effective and to achieving an outcome consistent with the objective pursued by it (para 77, with reference to *Lopes Da Silva Jorge*, *Popławski I* and *TC*).
- A national court cannot validly claim that it is impossible for it to interpret a provision of national law in a manner that is consistent with EU law merely because that provision has consistently been interpreted in a manner that is incompatible with EU law or is applied in such a manner by the relevant national authorities (para 79, with reference to *Ognyanov*).
- The interpretation of the national provision is up to the national court alone; however, the CJEU may provide some guidance and indicate to the national court which interpretation of national law would fulfil its obligation to interpret that law in conformity with EU law (para 87, with reference to *Klohn*).
- In *Popławski I* (paras 41 and 42), the CJEU already held that the EAW FD could be placed on the same footing as a 'convention' as mentioned in Article 6(3) of the Dutch Surrender of Persons Act (in the version applicable until the entry into force of the WETS). This interpretation ensures the conformity of the national law in question with the EAW FD (paras 91 and 92, with reference to paras 39 and 42 of *Popławski I*) and was also endorsed by the referring court, in accordance with methods of construction recognised by Dutch law (para 98).
- The decision on the execution of the EAW made against Popławski cannot depend on the minister's interpretation of Article 6(3) of the Dutch Surrender of Persons Act, as the minister is not a judicial authority for the purpose of the EAW FD (paras 95–98).
- If the national court can interpret Article 6 (3) of the Dutch Surrender of Persons Act (in the version applicable until the entry into force of the WETS) in an EU-conforming way, in accordance with the methods of construction recognised by Dutch law, it is required to apply that interpretation without having regard to the fact that the minister is opposed to that interpretation (para 98).
- The referring court should also consider that Article 4(6) EAW FD may be exercised only if the executing authority, after having ascertained, first, that the person is staying in, or is a national or a resident of, the executing Member State, and, second, that the custodial sentence passed in the issuing Member State against that person can actually be enforced in the executing Member State, considers that there is a legitimate interest that would justify the sentence imposed in the issuing Member State being enforced in the executing Member State (paras 100 and 101, with reference to *Sut*).
- The referring court should also seek for an interpretation that is not contrary to the objective of the EAW FD, bearing in mind that the purpose of Article 4(6) EAW FD is to avoid any risk of impunity of the requested person (paras 102–106).
- If Dutch law is interpreted in such a way that the refusal to execute the EAW issued by Poland is subject to the guarantee that the custodial sentence that Popławski received will actually be enforced in the Netherlands, this will be in conformity with the objectives of the EAW FD (para 107). According to the CJEU such an interpretation seems possible, but it is for the referring court to verify this (para 108).

Case C-700/21 *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un État tiers)*, Judgment of 6 June 2023.

- ***Facts.*** A Romanian court issued an EAW against a Moldovan national resident in Italy, for the purposes of executing a custodial sentence. Even though the stable nature of his family and professional life in Italy was established, the Italian executing authority did not have the option of refusing surrender so that the sentence could be executed in Italy. Under the Italian law transposing Article 4(6) EAW FD, that option is limited to EU nationals, thereby excluding third-country nationals. Taking the view that this difference in treatment is unjustified, the court seized the Italian Constitutional Court, which raised the question to the CJEU.
- ***Main questions.*** Does Article 4(6) EAW FD preclude a national law transposing that provision which excludes, absolutely and automatically, any third-country national staying or residing in the territory of that Member State from benefiting from that ground for optional non-execution of an EAW, without the executing judicial authority being able to assess the connections that that national has with that Member State? Does Article 4(6) EAW FD mean that, in order to assess whether it is appropriate to refuse to execute an EAW issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must carry out an assessment of the elements capable of showing that there are, between that person and the executing Member State, connections demonstrating that he or she is sufficiently integrated into that Member State? If so, what are those elements?
- ***CJEU's reply.*** **Article 4(6) EAW FD, read in conjunction with the principle of equality before the law under Article 20 Charter, precludes a national transposing law, which excludes, absolutely and automatically, any third-country national staying or resident in the territory of that Member State from benefiting from that ground for optional non-execution, without the executing judicial authority being able to assess the connections that that national has with that Member State. Article 4(6) EAW FD must be interpreted as meaning that, in order to assess whether it is appropriate to refuse to execute the EAW issued against a third-country national who is staying or resident in the territory of the executing Member State, the executing judicial authority must make an overall assessment of all the specific elements that characterise that national's situation which are capable of showing that there are, between that person and the executing Member State, connections demonstrating that he or she is sufficiently integrated into that State such that the execution in that Member State of the custodial sentence or detention order will contribute to increasing the chances of social rehabilitation after that sentence or detention order has been executed. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State.**
  - **A national law transposing Article 4(6) EAW FD that treats differently EU citizens and third-country nationals, by refusing the latter, absolutely and automatically, the benefit of that ground for optional non-execution, even where those third-country nationals are staying or resident in the territory of that Member State and without taking into account the degree of integration of those third-country nationals in that Member State, does not comply with the principle of equality before the law under Article 20 Charter** (para 51).
    - As regards grounds for optional non-execution such as those under Article 4(6), Member States are free to transpose them into their domestic law or not, and they may also choose to limit the situations in which the executing judicial authority may refuse to execute an EAW, thereby facilitating the surrender of requested persons, in accordance with the principle of mutual recognition (paras 35–37).

- However, that discretion is not unlimited. There is an obligation to comply with the fundamental rights and fundamental principles referred to in Article 6 TEU, including the principle of equality before the law under Article 20 Charter, which is applicable to all situations governed by EU law (paras 38–41).
    - Said principle requires that similar situations must not be treated differently and that different situations must not be treated in the same manner, unless such different treatment is objectively justified (para 42).
    - The requirement that situations must be comparable must be assessed in the light of all the elements that characterise them and, in particular, in the light of the subject matter and purpose of the act that makes the distinction in question, while the principles and objectives of the field to which the act relates must also be taken into account (para 43).
- For the purposes of Article 4(6) EAW FD, the situation of a third-country national who is the subject of an EAW for the purposes of the execution of a custodial sentence or detention order and who is staying or resident in the executing Member State is comparable with that of a national of that Member State or that of a national of another Member State who is staying or resident in that Member State and is the subject of such a warrant, so that difference in treatment is not objectively justified (paras 50–51).
    - The wording of Article 4(6) EAW FD makes no distinction on whether the requested person is a national of another Member State or not, but it subjects it only to two conditions: (i) the requested person is a national of, resident of or staying in the executing State and (ii) the executing State undertakes to execute the sentence or detention order. For both conditions a third-country national is in a situation comparable with that of an EU national who is staying or resident in that Member State (paras 46–48).
    - The objective of Article 4(6) EAW FD consists in increasing the requested person's chances of reintegrating into society. Also in this regard, EU citizens and third-country nationals are likely to have comparable chances for social rehabilitation if they serve their sentence in the executing Member State (para 49).
- However, nothing precludes a Member State from making the benefit of that ground of optional non-execution subject to the condition that that national has stayed or resided continuously in that Member State for a minimum period of time (para 52).
- Furthermore, a national law that absolutely and automatically excludes third-country nationals from benefitting from that ground, deprives the executing authority of the discretion necessary to decide whether or not to refuse surrender, taking into account the specific circumstances of each case and whether the connections between that person and the executing Member State are sufficient for the objective of social rehabilitation pursued by that provision to be better achieved by that person serving his or her sentence in that Member State and thus undermines that objective (paras 53–57).

- **In order to assess whether it is appropriate to refuse to execute the EAW, the executing judicial authority must make an overall assessment of all the specific elements characterising the situation of the requested person capable of showing that there are connections between that person and the executing Member State, such that the execution of the sentence in that Member State will contribute to increasing the chances of social rehabilitation** (para 68).

- Where the executing judicial authority finds that both of the conditions under Article 4(6) EAW FD are satisfied, it must then ascertain whether there is a legitimate interest which justifies the sentence or detention order imposed in the issuing Member State being enforced on the territory of the executing Member State (para 60).
- In that context, it is appropriate to take into account Framework Decision 2008/909, since it pursues the same objective of Article 4(6) EAW FD, and, in particular, the elements listed in recital 9 which include his or her family, linguistic, cultural, social or economic links to that State. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State, along with the nature, duration and conditions of his or her stay in that Member State (paras 61–64).
- Where the requested person is a third-country national, it is also necessary to take into account the nature, duration and conditions of that person's stay in the executing Member State. In particular, where the stay of the person concerned in the executing Member State is derived from having the status of a long-term resident under Directive 2003/109, there is a strong indication of sufficient connections with that Member State (paras 65 and 67).

7.3. *Ne bis in idem*

In relation to the principle of *ne bis in idem*,[7] the CJEU has clarified first of all 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) and Article 4(5) EAW FD (*Mantello, X (Mandat d'arrêt européen – Ne bis in idem), Juan*). The principle of *ne bis in idem* applies only where the facts at issue are identical. There must be a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space, irrespective of the legal classification given to them or the legal interest protected (*X (European arrest warrant – Ne bis in idem), Juan*). In order to establish the existence of the 'same acts', it is not necessary to take account of a classification of the offences in question under the law of the executing Member State, such as a 'continuing criminal offence' (*Juan*).

Next, 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 (Mandat d'arrêt – Témoin)*). In the context of the Agreement on the Surrender Procedure between the EU Member States, Norway and Iceland, the CJEU also clarified that the decision of an executing authority to refuse the execution of an arrest warrant cannot be assimilated to having been 'finally judged' within the meaning of Article 4(2) of that Agreement. The examination of a request for surrender does not imply the initiation of criminal proceedings by the executing State against the

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

requested person and does not involve an assessment of the merits of the case (*Sofiyska gradska prokuratura and Others (Mandats d'arrêt successifs*), see *supra* Section 4).

In relation to the **enforcement condition** under Article 4(5) EAW FD, the CJEU held that that condition is satisfied in case of partial remission of the sentence in accordance with the law of the sentencing country; however, it is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between preventing impunity and ensuring legal certainty for the person concerned by taking into account all the relevant circumstances, including the fact that the requested person has been the object of a general leniency measure (*X (Mandat d'arrêt européen – Ne bis in idem)*).

In relation to the interpretation of Article 50 Charter, the CJEU clarified that the bringing to an end of criminal prosecution by way of an amnesty and revocation of that amnesty do not preclude the **issue** of an EAW, as the national judicial authorities have not yet ruled on the criminal liability of the accused persons (*AB and Others (Révocation d'une amnistie)*).

It is noteworthy that the CJEU also interpreted the principle of *ne bis in idem* in relation to extradition requests from third countries, which are outside the scope of the EAW FD. In relation to a provisional arrest as part of the execution of an Interpol red notice at the request of a third country, the CJEU compared this with the EAW regime and held that although, under Article 3(2) EAW FD, the execution of an EAW is to be refused if the *ne bis in idem* principle applies, the arrest of the person concerned or his or her continued detention is precluded only if the judicial executing authority has established that the *ne bis in idem* principle applies.[8] In another case, the CJEU clarified that Article 54 CISA, read in the light of Article 50 Charter, must be interpreted as precluding the authorities of a Member State from extraditing a national of a third country to another third country where, first, that person has been convicted by final judgment in another Member State for the same acts as those referred to in the extradition request and has been subject to the sentence imposed in that state, and, second, the extradition request is based on a bilateral extradition treaty limiting the scope of the principle of *ne bis in idem* to judgments handed down in the requested Member State.[9]

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

- ***Facts.*** A German court received an EAW from an Italian court for the surrender of Mantello, an Italian national, in the context of a prosecution brought against him for drug-related offences and participation in a criminal organisation. The German court considered whether it should refuse to execute the EAW on the basis of Article 3(2) EAW FD, particularly in view of the following circumstances. Mantello had been convicted in Italy for possession of cocaine intended for resale while, at the time of the investigation which led to Mantello's conviction, the investigators already had sufficient evidence to charge and prosecute him in connection with the criminal charges set out in the EAW. However, for tactical reasons, such as breaking up the trafficking network and arresting other persons involved, the investigators had refrained from providing the relevant information and evidence to the investigating judge. The German judge

[8] Case C-505/19 PPU, *Bundesrepublik Deutschland (Notice rouge d'Interpol)*, Judgment of 12 May 2021, para 104, on the applicability of the principle of *ne bis in idem* under Article 50 Charter and Article 54 CISA to provisional arrests in execution of an Interpol red notice at the request of third countries. For a summary of this judgment, see Eurojust's *Overview of Case-Law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters* (revised 2021).

[9] Case C-435/22, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, Judgment of 28 October 2022, para 136. For a summary of this judgment, see Eurojust's *Overview of case-law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters* (forthcoming, 2023).

wondered whether this was a case of *ne bis in idem*, in particular because, under German law, as interpreted by the German Federal Court, a subsequent prosecution for participation in a criminal organisation would be allowed only if the investigators were unaware of this offence at the time of the first conviction, which was not the case.

- ***Main questions.*** Is the existence of 'same acts' of Article 3(2) EAW FD to be determined according to the law of the issuing Member State, according to the law of the executing Member State or according to an autonomous interpretation of EU law? May the executing authority in circumstances such as those in the main proceedings refuse to execute an EAW on the basis of Article 3(2) EAW FD?
- ***The CJEU's reply.*** **The concept of 'same acts' in Article 3(2) EAW FD constitutes an autonomous concept of EU law. In circumstances such as those at issue in the main proceedings where, in response to a request for information within the meaning of Article 15(2) EAW FD made by the executing judicial authority, the issuing judicial authority, applying its national law and in compliance with the requirements deriving from the concept of 'same acts' as enshrined in Article 3(2) EAW FD, expressly stated that the earlier judgment delivered under its legal system did not constitute a final judgment covering the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the executing judicial authority has no reason to apply, in connection with such a judgment, the ground for mandatory non-execution provided for in Article 3(2) EAW FD.** The CJEU's main arguments follow.
  - **'Same acts' is an autonomous concept of EU law.** The interpretation of 'same acts' cannot be left to the discretion of the judicial authorities of each Member State on the basis of their national law. It follows from the need for uniform application of EU law that, because that provision makes no reference to the law of the Member States with regard to that concept, the latter must be given an autonomous and uniform interpretation throughout the EU (para 38).
  - **'Same acts' has the same meaning in CISA and EAW FD.** The concept 'same acts' is also present in Article 54 CISA and in that context it has been interpreted as referring to the nature of the acts, encompassing a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected. In the light of the shared objective of Article 54 CISA and Article 3(2) EAW FD, which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, the interpretation given in the rulings concerning the CISA must be equally applied to the provision of the EAW FD (paras 39 and 40).
  - **The present case relates more to the concept of 'finally judged'** (para 43).
  - **Whether a case has been 'finally judged' must be determined by the law of the Member State in which judgment was delivered.** The CJEU refers to its *Turanský* judgment on the interpretation of Article 54 CISA and concludes that whether a person has been 'finally' judged for the purposes of Article 3(2) EAW FD is to be determined by the law of the Member State in which judgment was delivered (para 46). Because, in the case at stake, the Italian authorities had clearly stated that the facts on which the EAW was based had not been an object of the trial, the German authorities were bound to draw the appropriate conclusions from that assessment and had no reason to apply Article 3(2) EAW FD (paras 49 and 50).

Case C-268/17, *AY (Mandat d'arrêt – Témoin)*, Judgment of 25 July 2018.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling by an issuing judicial authority) and *supra* 4 (on the possibility to issue several successive EAWs and obligation to decide on the execution of the EAW).

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

Case C-665/20 PPU, *X (Mandat d'arrêt européen - Ne bis in idem)*, Judgment of 29 April 2021.

- **The facts.** X was arrested in the Netherlands on the basis of an EAW issued by the local court of Berlin for the purposes of prosecuting him for facts committed in Germany and amounting to attempted murder of his partner and her minor daughter, rape of his partner, severe mistreatment of his partner, and deprivation of liberty of his partner and her minor daughter. Before the executing court, X opposed his surrender relying on the *ne bis in idem* principle and arguing that he had already been finally judged in respect of those same facts in a third country, Iran. According to the findings of the executing court, X has been prosecuted in Iran for the aforementioned acts, with the exception of the daughter's deprivation of liberty, which has nevertheless been classified as attempted murder as regards its material elements. He was irrevocably convicted for some of the charges and irrevocably acquitted for others. Under Iranian law, X had to serve a prison sentence of seven years and six months. X has served most of this sentence, but the remainder of the sentence has been remitted as part of a general

'pardon' issued by the Supreme Leader of Iran on the occasion of the 40th anniversary of the Islamic Revolution. The Amsterdam court harbours doubts as to whether these circumstances are covered by the ground for refusal under Article 4(5) of the EAW FD and thus referred the case to the CJEU.

- **Main questions.** Is Article 4(5) of EAW FD to be interpreted as meaning that, where a Member State chooses to transpose that provision into its domestic law, the executing judicial authority must have a margin of discretion in order to determine whether or not it is appropriate to refuse to execute an EAW? Must the concept of 'same acts', contained in Article 3(2) and Article 4(5) of the EAW FD be interpreted uniformly? Is the condition regarding the execution of the sentence under Article 4(5) of the EAW FD satisfied where the requested person has served part of the sentence in the third State, whilst the remainder has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations?
- **The CJEU's reply. Article 4(5) of the EAW FD must be interpreted as meaning that, where a Member State chooses to transpose that provision into its domestic law, the executing judicial authority must have a margin of discretion in order to determine whether or not it is appropriate to refuse to execute an EAW. Article 3(2) and Article 4(5) of the EAW FD must be interpreted as meaning that the concept of 'same acts', contained in both provisions, must be interpreted uniformly. Article 4(5) of the EAW FD, which makes the application of the ground for optional non-execution laid down in that provision subject to the condition that, where there has been a sentence, the sentence has been served, is currently being served or may no longer be executed under the law of the sentencing country, must be interpreted as meaning that that condition is satisfied where the requested person has been finally sentenced, for the same acts, to a term of imprisonment, of which part has been served in the third State in which the sentence was handed down, whilst the remainder of that sentence has been remitted by a non-judicial authority of that State, as part of a general leniency measure that also applies to persons convicted of serious acts and is not based on objective criminal policy considerations. It is for the executing judicial authority, when exercising the discretion it enjoys, to strike a balance between, on the one hand, preventing impunity and combating crime and, on the other, ensuring legal certainty for the person concerned.** The CJEU's main arguments were the following.
  - **The executing authority must have a margin of discretion when applying the ground for non-execution under Article 4(5) of the EAW FD, allowing it to carry out an examination on a case-by-case basis, taking into consideration all of the relevant circumstances and, in particular, the circumstances in which the requested person was tried in the third State, in order to determine whether the failure to surrender that person would be such as to undermine the legitimate interest of all of the Member States in preventing crime within the area of freedom, security and justice (para 60).**
    - Member States are free to transpose the optional grounds for non-execution listed in Article 4 EAW FD into their domestic law or not. They may also choose to limit the situations in which the executing judicial authority may refuse to execute an EAW, thereby facilitating surrender in accordance with the principle of mutual recognition (para 41, with reference to *Wolzenburg*).
    - Member States cannot provide that judicial authorities are required to refuse to execute any EAW formally falling within the grounds for optional non-execution provided in Article 4 EAW FD, without those authorities having the opportunity to take into account the circumstances specific to each case (para 44).
    - Wording of Article 4 EAW FD. It is clear from the wording 'may refuse' that the executing judicial authority must have a margin of discretion as to whether or

not it is appropriate to refuse to execute an EAW on the grounds referred to in Article 4 EAW FD (para 43).

- Context of Article 4 EAW FD.
  - Refusal to execute an EAW constitutes an exception. The Court has repeatedly held that execution of an EAW constitutes the rule, whereas refusal is intended to be an exception to be interpreted strictly. A national law substituting the mere option of refusal in a genuine obligation would transform the refusal from an exception to a general rule (paras 46–47);
  - The wording of Article 4 EAW FD must be compared with that of Article 3 EAW FD, which sets out grounds for 'mandatory non-execution', where the executing authority has no margin of discretion (para 48).
  - Comparison between Article 3(2) and Article 4(5) EAW FD. The wording of the two provisions is almost identical except that the former concerns a case of a person who has been finally judged in respect of the same facts 'by a third State', whereas the latter 'by a Member State'. The lack of discretion under Article 3(2) EAW FD follows from the requirement to respect the *ne bis in idem* principle enshrined in Article 50 Charter, which is applicable to final acquittals or convictions 'within the Union'. The principle of mutual trust between the Member States in their respective criminal justice systems, which exists also between the State parties to the CISA, cannot be automatically transferred to judgments given by courts of third countries. Therefore, the attainment of the objective set out in Article 3(2) TEU of preventing and combating crime could be jeopardised if the executing authority were required, irrespective of the circumstances of each case, to refuse surrender on the ground set out in Article 4(5) EAW FD (paras 48–59).

- **The concept of 'same acts', contained in Article 3(2) and Article 4(5) EAW FD must be interpreted uniformly.**
  - Article 4(5) EAW FD, like Article 3(2) EAW FD, makes no express reference to the law of the Member State; therefore, in accordance with settled case-law, it must also be given an autonomous and uniform interpretation (para 72).
  - The concept of 'same facts' also appears in Article 54 CISA and, in view of its shared objective with that of Article 3(2), it must be interpreted in the same way, as referring only to the nature of those 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 (para 71, with reference to *Mantello*).
  - Wording. Article 4(5) and Article 3(2) share the same wording (para 73).
  - Context. The fact that Article 3(2) EAW FD concerns judgments delivered in the EU, while Article 4(5) EAW FD those delivered in a third State, cannot justify a different interpretation. It is precisely because the high level of trust that exists between Member States cannot be presumed as regards third countries that the fact that the requested person has been finally judged in a third State is listed in the grounds of optional rather than mandatory non-execution. Moreover, the executing judicial authority must have a margin of appreciation when applying Article 4(5) EAW FD, thereby when determining whether it is appropriate to refuse the execution of the EAW, it is able to take into account the trust which it may legitimately place in the criminal system of the third State concerned. Furthermore, to confer on Article 4(5) EAW FD a narrower scope than Article 3(2) EAW FD would be hard to reconcile with Article 54 CISA which

shares the same scope and is applicable also to some third countries that have acceded to it (paras 76–81).
    - Purpose of Article 4(5) EAW FD. Like Article 3(2) EAW FD, it is intended to ensure the legal certainty for the requested person by taking into account, within the allowed margin of appreciation, that the requested person was finally judged in a third State (para 82).
- **The remission of a sentence, granted in accordance with the law of the sentencing country cannot a priori be excluded from the scope of Article 4(5) EAW FD** (para 88).
    - Wording of Article 4(5) EAW FD. It refers to the law of the sentencing country in a general manner, therefore it is necessary in principle to recognise all leniency measures which have the effect that the penalty imposed may no longer be executed, irrespective of the seriousness of the acts, the authority which granted the measure and the considerations in which it is rooted (paras 86–87).
    - Context of Article 4(5) EAW FD. The condition regarding execution is worded in almost identical terms in Article 3(2) EAW FD and Article 54 CISA, so it must be given an identical scope. Furthermore, as Article 3(1) EAW FD envisages the possibility of amnesty in the executing Member State as ground for non-execution, the condition regarding execution in Articles 3(2) and Article 4(5) EAW FD covers amnesties or other leniency measures adopted in the sentencing third country or other Member State (paras 92–95).
    - Purpose of the condition regarding execution in Article 4(5) EAW FD. It aims at preventing offences going unpunished since, if the condition is not satisfied, it prevents the application of the *ne bis in idem* principle and accordingly requires surrender of the requested person. However, the principle of *ne bis in idem* also seeks to ensure legal certainty through respect of decisions of public bodies which have become final, including where the sentence has been remitted by a non-judicial authority as part of a general leniency measure which is not based on objective criminal policy considerations (paras 96–100).
    - However, when applying Article 4(5) EAW FD, the executing authority enjoys a margin of discretion allowing it to take into account all the relevant circumstances, including the fact that the requested person has been the object of a general leniency measure, the scope of that measure and the circumstances in which it was taken. When exercising its discretion, the executing authority must strike a balance between preventing impunity and ensuring legal certainty for the person concerned (paras 101–103).

Case C-203/20, *AB and Others (Révocation d'une amnistie)*, Judgment of 16 December 2021.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling).
- ***Facts.*** See *supra* 2.
- ***Main question.*** Must Article 50 Charter be interpreted as precluding the issue of an EAW against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision?
- ***CJEU's reply.*** **Article 50 Charter does not preclude the issue of an EAW against a person who was subject to a criminal prosecution that was initially discontinued by a final judicial decision adopted on the basis of an amnesty, and resumed following the adoption of a law revoking that amnesty and setting aside that judicial decision, if that decision was adopted before any determination as to the criminal liability of the person concerned.** The CJEU's main arguments follow.

- To determine whether a judicial decision constitutes a decision finally disposing of the case against a person, it is necessary, inter alia, to be satisfied that the decision was taken after the merits of the case were determined.
  - By analogy, see the CJEU's case-law on Article 54 Convention Implementing the Schengen Agreement (para 56).
  - This interpretation is in line with the wording of Article 50 Charter. The terms 'convicted' and 'acquitted' imply that the accused person's criminal liability has been examined and a determination has been made (para 57).
  - This interpretation is in line with the objective to prevent the impunity of persons who have committed an offence, as provided for in Article 3(2) TEU (para 58, with reference to *Ruska Federacija*).
- In the present case, it would appear that the sole effect of the decision was to discontinue criminal prosecutions before the Slovak courts could rule on the accused persons' criminal liability. However, the final assessment lies with the referring court (para 60).

Case C-164/22, *Juan*, Judgment of 21 September 2023.

- ***Facts.*** A Spanish national was, from the end of May 2001, chairman of the board of directors of a Portuguese company entirely controlled by a Spanish company, of which he was also, from the end of January of the same year, chairman of the board of directors. The main activity of the two companies was the same: the marketing of investment products which concealed a fraudulent pyramid scheme. That Spanish national is serving a prison sentence of 11 years and 10 months in Spain for serious fraud and money laundering which was imposed on him by a judgment of 2018 that became final in 2020. He was also sentenced in Portugal to 6 years and 6 months in prison for serious fraud. Portugal issued an EAW against him for the purpose of executing that sentence and forwarded it to the Spanish authorities. In December 2021, the National High Court of Spain refused to execute that EAW on the ground that the requested person was a Spanish national, while deciding that he would serve in Spain the sentence imposed in Portugal. The requested person, who brought an appeal against that order, claimed that the EAW may not be executed and the Portuguese judgment may not be enforced due to an infringement of the principle of *ne bis in idem*. According to him, the facts on which the Spanish judgment is based are the same as those that form the subject of the Portuguese judgment.
- ***Main question.*** Is the execution of an EAW precluded when issued by a Member State in a situation where the offence for which the requested person has been finally judged in the executing Member State and the offence for which that person is being prosecuted in the issuing Member State are, according to the law of the executing Member State, to be classified as a 'continuing criminal offence'?
- ***CJEU's reply.*** **Article 3(2) EAW FD must be interpreted as precluding the execution of an EAW issued by a Member State in a situation where the requested person has already been finally judged in another Member State and is serving a prison sentence there for the offence established in that judgment, provided that that person is being prosecuted in the issuing Member State in respect of the same acts, without it being necessary, in order to establish the existence of the 'same acts', to take account of the classification of the offences in question under the law of the executing Member State.** The CJEU's main arguments follow.
  - Article 3(2) constitutes a ground for mandatory non-execution (para 27).
  - The purpose of this provision is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, and reflects the *ne bis in idem* principle enshrined in Article 50 Charter, according to which no one may be tried or punished twice in criminal proceedings for the same criminal offence (para 28, with reference to *AY (Arrest warrant – Witness))*.

- One of the conditions is that the requested person has been finally judged 'in respect of the same acts'. This concept must be given an autonomous and uniform interpretation throughout the EU (paras 29–30, with reference to *X (European arrest warrant – Ne bis in idem)*).
- There must be a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space, irrespective of the legal classification given to them or the legal interest protected (paras 31–32, with reference to *X (European arrest warrant – Ne bis in idem)* and *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)).*
- The principle of *ne bis in idem* is not intended to be applied where the facts at issue are not identical, but merely similar (para–33, with reference to *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)*).
- The mere reference in a given judgment to a factual element relating to the territory of another Member State is insufficient to conclude that the facts are identical. It must also be ascertained whether the court which gave that judgment has actually ruled on that factual element in order to make out the offence, to establish the liability for that offence of the person against whom proceedings were brought and, as the case may require, to impose a penalty on that person, such that the offence is to be regarded as encompassing the territory of that other Member State (para 34, with reference to *Nordzucker and Others*).
- It is for the referring court to determine whether, in the present case, the acts which are the subject of the Portuguese judgment are identical to those in respect of which a final judgment has been passed by the Spanish courts. That being so, the CJEU may provide the referring court with elements of interpretation of EU law in the context of the assessment of the identity of the acts ((para 35, with reference to *Generalstaatsanwaltschaft Bamberg (Reservation in relation to the principle ne bis in idem)*.
- In the present case, subject to verification by the referring court, it appears that the facts referred to in the Spanish and Portuguese judgments are not inextricable linked together and thus not identical. It follows from the file before the CJEU that the requested person repeated in Portugal the fraudulent activity he was carrying out in Spain. Although those activities followed the same operating method, they were nevertheless carried out by separate legal entities, one pursuing the fraudulent activity in Spain and the other pursuing the fraudulent activity in Portugal. In addition, there is only occasional overlap between the acts committed in Portugal and those committed in Spain, since the fraudulent activity in Portugal continued after an investigation was opened and activity in Spain ceased. The injured persons were also different. The Spanish judgment concerns the fraudulent activity carried out in Spain to the detriment of persons residing in Spain, while the Portuguese judgment concerns the activity carried out in Portugal to the detriment of persons residing in Portugal (para 36).
- The fact raised by the referring court that the offences committed in Spain and those committed in Portugal should be classified as a 'continuing criminal offence' under Spanish law cannot affect that conclusion, in so far as Article 3(2) EAW FD requires an assessment of the material facts on the basis of objective factors, irrespective of their classification in national law (para 37).

7.4. Extraterritoriality

In relation to the 'extraterritoriality' ground, the CJEU clarified that the concept 'an offence committed outside the territory of the issuing Member State' (Article 4(7)(b) EAW FD) is an autonomous concept of EU law that must be given a uniform interpretation throughout the EU (*Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)*). In the case of an EAW issued on the basis of a judicial decision of the issuing Member State that allows the execution, in that Member State, of a sentence imposed by a court of a third State, when the offence concerned was committed in the territory of the latter country, the question of whether that offence was committed 'outside the territory of the issuing Member State' must be resolved by taking into consideration the criminal jurisdiction of that third State and not that of the issuing Member State (*Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)*).

Case C-488/19, *Minister for Justice and Equality (Mandat d'arrêt – Condamnation dans un État tiers, membre de l'EEE)*, Judgment of 17 March 2021.

- See also *supra* 3.1 (on the requirement of a national arrest warrant or any other enforceable decision).
- ***Facts.*** A Norwegian court sentenced JR, a Lithuanian national, to a custodial sentence of four years and six months for the unlawful delivery of a very high quantity of drugs. On the basis of a bilateral agreement between Norway and Lithuania, a Lithuanian court recognised the Norwegian judgment so that the sentence could be executed in Lithuania, and Norwegian authorities then surrendered JR to Lithuania. In 2016, Lithuanian authorities released JR on parole, accompanied by intensive supervision measures. JR evaded those conditions, absconded and went to Ireland. Since JR had not complied with his supervision conditions, a Lithuanian court ordered that the remainder of the custodial sentence – one year, seven months and 24 days – be executed and issued an EAW for that purpose. Before the Irish court, JR disputed his surrender to Lithuania and argued inter alia that because of the extraterritorial nature of the offence, Ireland should refuse to execute the EAW. The High Court referred a question for a preliminary ruling.
- ***Main question.*** In the case of an EAW issued on the basis of a judicial decision of the issuing Member State allowing execution in that Member State of a sentence imposed by a court of a third State, where the offence concerned was committed in the territory of the latter State, must the question whether the offence was committed 'outside the territory of the issuing Member State' (Article 4(7)(b) EAW FD) be resolved by taking into consideration the circumstance that preparatory acts took place in the issuing Member State?
- ***CJEU's reply.*** **Article 4(7)(b) EAW FD must be interpreted as meaning that, in the case of an EAW issued on the basis of a judicial decision of the issuing Member State allowing execution in that Member State of a sentence imposed by a court of a third State, where the offence concerned was committed in the territory of the latter State, the question whether that offence was committed 'outside the territory of the issuing Member State' must be resolved by taking into consideration the criminal jurisdiction of that third State – in this instance, the Kingdom of Norway – which allowed prosecution of that offence, and not that of the issuing Member State.** The CJEU's main arguments follow.
  - The concept 'an offence committed outside the territory of the issuing Member State' is an autonomous concept of EU law which must be given a uniform interpretation throughout the EU (para 66). The concept must be interpreted in light of the following.
    - The objective of Article 4(7)(b) EAW FD. This provision is aimed at ensuring that an executing judicial authority is not obliged to grant an EAW which was issued for an offence prosecuted under international criminal jurisdiction. The

objective is not undermined in the case at hand as the court that imposed a custodial sentence did so under its own territorial criminal jurisdiction (paras 68–69).
    - The purpose of the EAW FD. The EAW FD established a new simplified and effective system for surrender, founded on a high level of confidence and seeks to prevent the risk of impunity of persons who have committed an offence (paras 71–72).
    - The rehabilitation objective included in several judicial cooperation instruments, including Framework Decision 2008/909 or Framework Decision 2008/947 (paras 74–77).
  - The crucial element is the criminal jurisdiction of the third State, which allowed prosecution of that offence, and not that of the issuing Member State (para 78).
  - The circumstance that preparatory acts took place in the territory of the issuing Member State is irrelevant, since that Member State did not prosecute the offence itself, but recognised a judgment of a court of another State which that court had delivered under its territorial criminal jurisdiction (para 79).

7.5. *In absentia* judgments

Autonomous concept of EU law

In relation to the different terms included in Article 4a(1) EAW FD – i.e. 'summoned in person', 'actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' or 'trial resulting in a decision' – constitute autonomous concepts of EU law that need to be interpreted uniformly throughout the EU (*Dworzecki*). As regards the term 'trial resulting in the decision', the CJEU held that this term relates only to the proceedings that led to the decision which finally determined the guilt of the person concerned and imposed a penalty on them (*Tupikas; Zdziaszek; Ardic; Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*). Appeal proceedings which gave rise to a judgment varying the decision delivered at first instance and thereby finally disposing of the case fall within the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*). A decision revoking a suspension of a custodial sentence on account of the breach by the person concerned of an objective condition attached to that suspension, such as the commission of a new offence during the probation period, does not fall within the scope of Article 4a(1) EAW FD (*Ardic; Minister for Justice and Equality (Levée du sursis)* and can thus not lead to a refusal to execute the EAW based on that ground. However, where the suspension of a custodial sentence is revoked, on account of a new criminal conviction, and an EAW, for the purpose of executing that sentence, is issued, that (second) criminal conviction, handed down *in absentia*, constitutes a 'decision' within the meaning of Article 4a(1) EAW FD (*Minister for Justice and Equality (Levée du sursis)*. Similarly, the concept of 'trial resulting in the decision' encompasses proceedings which led to a judgment imposing a cumulative sentence, by the subsequent aggregation of sentences previously handed down, where, in the context of those proceedings, the authority which delivered that cumulative judgment may neither review the finding of guilt of the person concerned nor amend those previous sentences, but does have a margin of discretion in determining the level of that cumulative sentence (*Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*).

Exhaustive harmonisation, no higher national standards and need for some margin of discretion to take into consideration 'other circumstances'

The CJEU also underlined that Article 4a(1) EAW FD 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/higher requirements based on national law (*Melloni; Anacco*). It also means that the executing authority

cannot refuse the execution of the EAW if the EAW contains one of the statements referred to in points (a) to (d) of Article 4a(1) EAW FD (*Tupikas; Generalstaatsanwaltschaft Berlin (Condamnation par défaut); Anacco*). Conversely, the executing judicial authority *may* refuse to surrender the requested person where the EAW does not contain any of the statements mentioned in these points. However, that authority is not under an obligation to refuse, but must have some discretion as to whether or not it is appropriate to refuse (*Minister for Justice and Equality (Levée du sursis)*). An executing judicial authority may, even after it has found that the circumstances referred to in subparagraphs (a) to (d) do not cover the situation of the person who is the subject of the EAW, take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his or her rights of defence. When taking into account the circumstances specific to each case, this may include, for instance, the conduct of the person concerned, in particular the fact that he or she sought to avoid any contact with his or her lawyers (*European arrest warrant – Ne bis in idem); Generalstaatsanwaltschaft Hamburg Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*).[10]

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 the household concerned, who undertook to pass it on to him or her does not in itself satisfy the conditions set out in Article 4a(1)(a) when it cannot be ascertained from the EAW whether and, if so, when that adult actually passed that summons on to the person concerned (*Dworzecki; Generalstaatsanwaltschaft Berlin (Condamnation par défaut*). Where an executing judicial authority satisfies itself that the conditions laid down in Article 4a(1) (a) are not satisfied, it may also rely on other circumstances that enable it to be assured that the passing on of the summons to the person concerned does not mean a breach of his or her rights of defence, in particular the conduct of the person concerned (*Dworzecki; Generalstaatsanwaltschaft Berlin (Condamnation par défaut*).

National legislation, transposing Article 4a(1) EAW FD in a way which generally precludes an executing judicial authority from executing an EAW issued for the purposes of executing a sentence, where the person concerned did not appear in person at the trial resulting in the decision concerned, is contrary to EU law (*Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*). In such a scenario, a national court is required, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret that national legislation, to the greatest extent possible, in the light of the text and the purpose of that framework decision.

Given that the EAW FD lists exhaustively the grounds for refusing to execute an EAW that framework decision therefore precludes an executing judicial authority from refusing to surrender a person who is the subject of an EAW for the purpose of executing a custodial sentence for grounds not included in the relevant provisions. However, the executing judicial authority may exceptionally refuse the surrender of the requested person on the basis of Article 1(3) EAW FD, in light of Article 47(2) Charter, but only in so far as the two-step assessment test is met (*Minister for Justice and Equality (Levée du sursis)*).

Article 4a(1)(d) versus (former) Article 5 EAW FD

The executing judicial authority is not (any longer) allowed to make the surrender of the requested person subject to the condition that he or she will be afforded the right to a retrial, as this is not (any longer)[11] one of the conditions listed in Article 5 EAW FD. However, that authority may have to seek,

[10] See also the CJEU's ruling in Case C-569/20, *Spetsializirana prokuratura (Procès d'un accusé en fuite)*, in which the CJEU interpreted Articles 8 and 9 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1), and concluded that a person may be denied the right to a retrial if he or she deliberately evaded the judicial proceedings by preventing the authorities from informing him or her of the trial.

[11] Article 5(1) of the original text of the EAW FD, was in this regard amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and

by means, if necessary, of a request for supplementary information (Article 15(2) EAW FD), an assurance from the issuing Member State that the person who is the subject of the EAW will be informed that, under the law of the issuing Member State, he or she will be granted the right to a retrial. If such an assurance were given by the issuing Member State, the executing judicial authority would be obliged to surrender the person concerned, in accordance with Article 4a(1)(d) EAW FD (*Minister for Justice and Equality (Levée du sursis)*).

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

- See *infra* 8 (on guarantees).

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

- ***Facts.*** See *supra* 6 (on human rights scrutiny).
- ***Main question.*** Must Article 4a(1) EAW FD be interpreted as precluding the executing judicial authority from making the execution of an EAW conditional on the conviction rendered *in absentia* being open to review in the issuing Member State?
- ***The CJEU's reply.*** **Article 4a(1) EAW FD does not allow that an executing judicial authority makes the execution of an EAW conditional on the conviction rendered *in absentia* being open to review in the issuing Member State.** The CJEU's main arguments follow.
  - **The purpose of the EAW FD.** As is apparent in particular from Article 1(1) and (2) EAW FD and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a simplified and more effective system of surrender based on the principle of mutual recognition (paras 36 and 37, with reference to *Radu*).
  - **The exhaustive nature of the list of grounds for non-recognition.** Under Article 1(2) EAW FD, the Member States are in principle obliged to act on an EAW. They may refuse to execute such a warrant only in the cases of mandatory non-execution provided for in Article 3 EAW FD and in the cases of optional non-execution listed in Articles 4 and 4a EAW FD (para 38, with reference to *Radu*).
  - **The wording, scheme and purpose of Article 4a(1) EAW FD.** Article 4a(1) EAW FD provides for an optional ground for non-execution of an EAW where the person concerned was convicted *in absentia*. That option is nevertheless accompanied by four exceptions in which the executing judicial authority may not refuse to execute the EAW (paras 39–42).
  - **The objective of FD 2009/299.** The EU intended to facilitate judicial cooperation in criminal matters by improving mutual recognition of judicial decisions between Member States through harmonisation of the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person (para 43).
  - **The exhaustive nature of the list of circumstances in which the execution of the EAW must be regarded as not infringing the rights of the defence** (para 44).

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

- ***Facts.*** Polish judicial authorities issued an EAW for the surrender of Dworzecki, a Polish national, for the purpose of executing in Poland three custodial sentences of 2 years, 8 months and 6 months, respectively. The request for a preliminary ruling concerned surrender for the purpose of executing only the second custodial sentence. As regards that sentence, point D of

2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p. 24–36.

the EAW stated that Dworzecki had not appeared in person at the trial leading to the judgment in which the sentence was imposed. The Polish judicial authority acknowledged in the EAW form that the person was not summoned in person, but the summons was sent to the address which Dworzecki had indicated for service of process and it was received by Dworzecki's grandfather, who had undertaken to pass the process on to the addressee. Against this background, the Dutch executing judicial authority had some questions about the interpretation of Article 4a(1)(a)(i) EAW FD.

- ***Main questions.*** Are the terms of Article 4a(1)(a)(i) EAW FD 'summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision' and 'by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' autonomous concepts of EU law? Does a summons, such as that at issue in the main proceedings, satisfy the conditions laid down in that provision?
- ***The CJEU's reply.*** **Both terms are autonomous concepts of EU law. A summons which was not served directly on the person concerned, but was handed over, at the latter's address, to an adult belonging to that household who undertook to pass it on to him, when it cannot be ascertained from the EAW whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in Article 4a(1)(a)(i) EAW FD.** The CJEU's main arguments follow.
  - The terms 'summoned in person' and 'actually received by other means [...] in such a manner that it was unequivocally established that he or she was aware of the scheduled trial' of Article 4a(1)(a)(i) EAW FD constitute autonomous concepts of EU law and thus need to be interpreted in the same way in the whole EU (para 32).
  - A summons that was not directly handed over to the person concerned but sent to the person's address and given to an adult resident of the person's household who undertook to pass it on to the latter is not enough in itself to satisfy the condition set out in Article 4a(1)(a)(i) EAW FD (para 54).
  - Duties and options for issuing and executing authorities under Article 4a(1)(a)(i) EAW FD.
    - The issuing judicial authority is required to indicate in the EAW the evidence on the basis of which it found that the person concerned actually received official information of the scheduled date and place of the trial (para 49).
    - The executing judicial authority, when assessing whether the conditions of Article 4a(1)(a)(i) EAW FD are fulfilled, can not only rely on the EAW but also take into account other circumstances (para 50), including:
      - specific circumstances of which the executing judicial authority became aware when hearing the person concerned (para 49);
      - a possible lack of diligence in the conduct of the concerned person, e.g. if the person tried to avoid service of the summons addressed to them (para 51);
      - specific provisions of national law of the issuing Member State such as the provision of the Polish criminal procedure, which grants the person a right to request a retrial under certain conditions (para 52).
    - The executing judicial authority can always request, as a matter of urgency, additional information on the basis of Article 15(2) EAW FD if it finds that the information provided by the issuing judicial authority is insufficient (para 53).

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

- ***Facts.*** In 2017, a Lithuanian court issued an EAW for Tupikas in relation to the execution of a sentence of 1 year and 4 months. Although it was a proven fact that Tupikas had appeared in

person at the trial at first instance, the EAW did not contain any information concerning his presence in the appeal proceedings. The referring Dutch court wondered whether the mere fact that the person concerned was able to exercise his right of defence at first instance is sufficient for it to conclude that the requirements laid down in Article 6 ECHR (right to a fair trial) and Article 47 Charter (right to an effective remedy and to a fair trial) had been met. Therefore, the Dutch court decided to stay the proceedings and to refer a question to the CJEU.

- ***Main question.*** Does the term 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD, refer only to proceedings at first instance or, to the contrary, also to appeal proceedings?
- ***The 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 them, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case. An appeal proceeding such as that at issue in the main proceedings in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above.** The CJEU's main arguments follow.
  - **The concept of 'trial resulting in the decision' of Article 4a(1) EAW FD.**
    - The concept of 'trial resulting in the decision' constitutes an autonomous concept of EU law and thus needs to be interpreted uniformly throughout the EU (paras 65–68).
    - Where the issuing Member State has provided for a criminal procedure involving several degrees of jurisdiction which may thus give rise to successive judicial decisions, at least one of which has been handed down *in absentia*, the concept of 'trial resulting in the decision' must be interpreted as relating only to the instance at the end of which the decision is handed down which finally rules on the guilt of the person concerned and imposes a penalty on them, such as a custodial sentence, following a re-examination, in fact and in law, of the merits of the case (paras 70–90 and 98).
    - An appeal proceeding such as that at issue in the main proceedings in principle falls within that concept. It is nonetheless up to the referring court to satisfy itself that it has the characteristics set out above (para 99).
  - **The application of Article 4a(1) EAW FD.**
    - When the person concerned appeared before the judge responsible for a fresh assessment of the merits of the case, Article 4a(1) did not apply (para 86).
    - Conversely, when the person concerned was present at the first instance, i.e. not at the proceedings concerned with a fresh assessment of the merits of the case, Article 4a(1) applied and the executing judicial authority was required to carry out the checks provided in that article (paras 86 and 93).
  - **The assessment to be made by the executing judicial authority.**
    - In a case such as that in the main proceedings the issuing judicial authority must provide the information referred to in Article 8(1) EAW FD and the executing judicial authority is empowered, in accordance with Article 15(2) EAW FD, to request additional information which it considers necessary to enable it to make a decision on the surrender (para 91).
    - If the executing judicial authority finds that the situation before it corresponds to one of those described in Article 4a(1)(a) to (d), it is required to execute the EAW and to authorise the surrender of the person sought (para 95).

- Article 4a EAW FD provides for an optional ground for non-execution of the EAW and the cases referred to in Article 4a(1)(a) to (d) were conceived as exceptions to that optional ground for non-recognition (para 96).
- If the executing judicial authority finds that the situation before it does not correspond to one of those described in Article 4a(1)(a) to (d), it can take into account other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of their rights of defence (para 96, with reference to *Dworzecki*).
- Thus, the EAW FD does not prevent the executing judicial authority from ensuring that the rights of the person concerned are upheld by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain, provided that compliance with the deadlines laid down in Article 17 EAW FD is not called into question (para 97).

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

- ***Facts.*** In 2014, a Polish court issued an EAW against Zdziaszek, a Polish national, residing in the Netherlands, for the execution of two custodial sentences in Poland. Point (d) of the EAW indicated that Zdziaszek did not appear in person during the proceedings which led to the judicial decision which finally determined the sentence that he would have to serve. On the basis of the information provided by the issuing authority, the referring court took the view that the situation referred to in Article 4a(1)(b) EAW FD did not apply in the case because it was not apparent from that information that the person sought '[was] aware of the scheduled trial' or that he 'had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him ... at the trial'. The Dutch court decided to stay the proceedings and refer questions to the CJEU for a preliminary ruling.
- ***Main questions.*** Must the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD be interpreted as referring to the appeal proceedings and/or to proceedings for the amendment of custodial sentences handed down previously, such as those which led to the judgment handing down a cumulative sentence at issue in the main proceedings? Is an executing judicial authority allowed to refuse to execute the EAW for the sole reason that neither the standard form of the EAW nor the additional information obtained from the issuing judicial authority pursuant to Article 15(2) EAW FD provide sufficient information to enable it to establish that one of the situations referred to in Article 4a(1)(a) to (d) EAW FD exists?
- ***The CJUE's reply.*** **The concept of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD must be interpreted as referring not only to the proceedings which gave rise to the decision on appeal, where that decision, after a fresh examination of the case on the merits, finally determined the guilt of the person concerned, but also to subsequent proceedings, such as those that led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard. The EAW FD must be interpreted as meaning that, where the person concerned has not appeared in person in the relevant proceedings and where neither the information contained in the standard EAW form nor the information obtained pursuant to Article 15(2) EAW FD provide sufficient evidence to establish the existence of one of the situations referred to in Article 4a(1)(a) to (d) EAW FD, the executing judicial authority may refuse to execute the EAW. However, the EAW FD does not prevent that authority from taking account of all the circumstances characterising the case brought before it to ensure that the rights of the**

defence of the person concerned are respected during the relevant proceeding. The CJEU's main arguments follow.

- **The concept of 'trial resulting in the decision' of Article 4a(1) EAW FD.**
  - The concept must be interpreted as covering the appeal proceedings that led to the decision which, after a new examination of the merits of the case in fact and in law, finally determined the guilt of the person concerned and imposed a penalty on them, such as a custodial sentence, even though the sentence handed down was amended by a subsequent decision (paras 76–82, with reference to *Tupikas*).
  - The concept must be interpreted as also covering subsequent proceedings, such as those which led to the judgment handing down the cumulative sentence at issue here, at the end of which the decision that finally amended the level of the initial sentence was handed down, inasmuch as the authority which adopted the latter decision enjoyed a certain discretion in that regard (para 96, with reference to relevant case-law from the ECtHR in paras 87–89).
  - In a case such as that at issue in the main proceedings, where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on them, the level of which was, however, amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of Article 4a(1) EAW FD (para 93).
- **The assessment to be made by the executing judicial authority.**
  - In a case such as that in the main proceedings, the issuing judicial authority must provide the information referred to in Article 8(1) EAW FD in relation to the appeal proceedings and the subsequent proceedings (paras 97–99).
  - The executing judicial authority is entitled to refuse to execute an EAW issued for the purpose of executing a custodial sentence or a detention order if the person concerned did not appear in person at the trial resulting in the decision, unless the EAW indicates that the conditions set out in subparagraphs (a), (b), (c) or (d) of that provision are met (para 101).
  - If the executing judicial authority finds that the situation before it corresponds to one of those described in Article 4a(1)(a) to (d), the executing judicial authority is required to execute the EAW and to authorise the surrender of the person sought (para 102).
  - If the executing judicial authority takes the view that it does not have sufficient information to enable it to validly decide on the surrender of the person concerned, it is incumbent on it to apply Article 15(2) EAW FD by requesting from the issuing judicial authority the urgent provision of such additional information (para 103).
  - The executing judicial authority must ensure that the time limits laid down in Article 17 EAW FD are complied with, with the result that it cannot be required to resort to that Article 15(2) EAW FD again (para 105, with reference to *Aranyosi and Căldăraru*).
  - If it has not obtained the necessary assurances as regards the rights of defence of the person concerned during the relevant proceedings, the executing judicial authority may refuse to execute the EAW (para 104).
  - Article 4a EAW FD provides for an optional ground for non-execution of the EAW and the cases referred to in Article 4a(1)(a) to (d) were conceived as exceptions

to that optional ground for non-recognition (para 106, with reference to *Tupikas*).

- The executing judicial authority may, even after it has found that those cases do not cover the situation of the person who is the subject of the EAW, take account of other circumstances that enable it to ensure that the surrender of the person concerned does not entail a breach of their rights of defence (para 107, with reference to *Dworzecki*).
- Thus, the EAW FD does not prevent the executing judicial authority from ensuring that the rights of defence of the person concerned are respected by taking due consideration of all the circumstances characterising the case before it, including the information which it may itself obtain (para 108).

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

- ***Facts.*** In 2009 and 2010, two German courts imposed on Ardic, a German national, two custodial sentences, each for a period of 1 year and 8 months, following trials at which he had appeared in person. After serving a portion of those two sentences, the competent courts granted a suspension of the execution of the remainder of those sentences. However, in 2013, one of the courts revoked those suspensions and ordered the execution of the remainder of those sentences on the ground that Ardic had persisted in infringing the prescribed conditions and evading the supervision and guidance of his probation officer and the supervision of the courts. Ardic did not appear at the proceedings which resulted in the revocation decisions. In 2017, an application for the execution of a German EAW was made before a Dutch court as Ardic had in the meantime moved to the Netherlands.
- ***Main question.*** If the requested person has been found guilty in final proceedings conducted in the requested person's presence and has had imposed on them a custodial sentence, the execution of which has been suspended subject to certain conditions, do subsequent proceedings, in which the court, in the absence of the requested person, orders that suspension to be revoked on the ground of non-compliance with conditions and evasion of the supervision and guidance of a probation officer, constitute a 'trial resulting in the decision' as referred to in Article 4a EAW FD?
- ***The CJEU's reply.*** **Where a party has appeared in person in criminal proceedings that result in a judicial decision which definitively finds him guilty of an offence and, as a consequence, imposes a custodial sentence the execution of which is subsequently suspended in part, subject to certain conditions, the concept of 'trial resulting in the decision' must be interpreted as not including subsequent proceedings in which that suspension is revoked on grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.** The CJEU's main arguments follow.
  - Except in exceptional circumstances, the executing judicial authorities may refuse to execute an EAW only in the exhaustively listed cases of non-execution provided for by the EAW FD, and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein (para 70, with reference to *Tupikas*).
  - Article 4a(1) EAW FD must be interpreted as meaning that the concept of 'decision' referred to therein relates to the judicial decision or decisions concerning the criminal conviction of the person concerned. Thus, it must be determined whether a decision to revoke suspension of execution of a custodial sentence previously imposed is of such a nature that it can be equated to such 'decision' (paras 67 and 68).
  - Whereas the final judicial decision convicting the person concerned, including the decision determining the custodial sentence to be served, falls fully within Article 6

ECHR, it is apparent from the case-law of the ECtHR that that provision does not apply to questions relating to the detailed rules for the execution or application of such a custodial sentence. The position is different only where, following a finding of guilt of the person concerned and having imposed a custodial sentence on them, a new judicial decision modifies either the nature or the quantum of sentence previously imposed (paras 75 and 76).

- The decision to revoke the suspension of the execution of previously imposed custodial sentences did not affect the nature or the quantum of custodial sentences imposed by final conviction judgments of the person concerned. The proceedings leading to those revocation decisions were not intended to review the merits of the cases but only concerned the consequences, i.e. the fact that the convicted person had not complied with those conditions during the probationary period (paras 78 and 79).
- The only effect of suspension revocation decisions is that the person concerned must at most serve the remainder of the sentence initially imposed (para 81).
- Even where a convicted person has been the subject of a suspension revocation decision adopted following proceedings in which the convicted person has not appeared, that person is not deprived of all rights insofar as they have the right to be heard a posteriori by the judge and inasmuch as that judge is required to determine whether, in the light of the hearing, the suspension revocation decision must be amended (para 85).

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

- ***Facts.*** The German authorities arrested TR in execution of two Romanian EAWs issued for the execution of two different custodial sentences, both rendered *in absentia*. In the criminal proceedings against him in Romania, TR was not summoned in person because he was not found at his last known address. TR did not appear in person at trial but he was nevertheless aware of the proceedings against him, and at first instance – in each of the two cases – he mandated a lawyer of his choosing and was defended by his chosen counsel. At appeal stage, TR was represented by a court-appointed lawyer. It also results that TR absconded in Germany to avoid the criminal proceedings against him in Romania. The Romanian issuing authorities refused to guarantee to the German executing authorities that TR would be entitled to a new trial since he was validly summoned according to Romanian law. The German authorities executed the EAWs and ordered his surrender to Romania, holding that even though he did not appear in person at his trials, he prevented his summons in person by fleeing to Germany and he was aware of the proceedings against him, in which he was defended by a lawyer of his choosing. TR challenged the lawfulness of the decision to execute the EAWs on the ground that the absence of a guarantee to a new trial by the Romanian issuing authorities would be in violation of Articles 8 and 9 of Directive 2016/343.
- ***Main question.*** Does Article 4a EAW FD mean that the executing authority may refuse the execution of an EAW issued for the purpose of executing a custodial sentence where the person prevented his summons in person and did not appear in person at his trial due to his absconding in the executing Member State, based on the mere ground that the issuing authority did not offer the guarantee of his right to a new trial within the meaning of Articles 8 and 9 of Directive 2016/343?
- ***CJEU's reply.*** **Article 4a EAW FD must be interpreted as meaning that the executing authority cannot refuse the execution of an EAW issued for the purpose of executing a custodial sentence where the requested person prevented his summons in person and did not appear in person at his trial due to his absconding in the executing Member State, based on the mere ground that the issuing authority did not offer the guarantee of his right to a new trial within the meaning of Articles 8 and 9 of Directive 2016/343.** The CJEU's main arguments follow.

- **Non-compliance with by the national law of the issuing Member State with the provisions of Directive 2016/343 cannot constitute a valid ground to refuse the execution of an EAW** (para 46).
  - Article 4a(1) of the EAW FD harmonises the conditions of execution of an EAW in the event of a conviction rendered *in absentia*. It restricts the possibility of refusing to execute the EAW by listing the conditions under which the recognition and enforcement of a decision rendered following a trial in which the person concerned did not appear in person may not be refused (paras 36 and 37, with a reference to *Tupikas* and *Melloni*).
  - Article 4a(1) of the EAW FD does not infringe the right to effective judicial protection nor the rights of the defence, enshrined in Articles 47 and 48 Charter (para 42, with a reference to *Melloni*).
  - Articles 8 and 9 of Directive 2016/343 grant the right to be present at trial and the right to a new trial where the conditions allowing for a trial *in absentia* were not met. Yet, invoking the provisions of Directive 2016/343 to refuse the execution of an EAW would allow to circumvent the system of the EAW FD which lists in an exhaustive manner the grounds for non-execution. Furthermore Directive 2016/343 does not apply to EAW proceedings (paras 43–47).
  - The impossibility to invoke Directive 2016/343 to prevent the execution of an EAW does not affect the absolute obligation of the issuing Member State to comply, within its national legal order with EU law and the requested person, after his surrender, may invoke those provisions before the courts of the issuing Member State (paras 55 and 56).
- **The assessment to be made by the executing judicial authority.**
  - The executing authority must first determine whether the trial at first instance or the appeal falls within the notion of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD and secondly assess whether the conditions laid down in such provisions are met in relation to each of those proceedings (paras 48–50, with a reference to *Tupikas*).
  - Since Article 4(a)(1) EAW FD contains an optional ground for non-execution, where the conditions under said provisions are not met, the executing authority may take into consideration other circumstances that allow him to ensure that the surrender of the requested person does not lead to a violation of his right of defence and order his surrender (para 51).
  - Within those other circumstances, the executing authority may take into account the behaviour of the requested person and the fact that he prevented his summons in person or any contact from the court-appointed lawyers, or also that he appealed against the first instance decisions (paras 52 and 53);
  - Where, to the contrary, the conditions under Article 4(a)(1) EAW FD are met, the executing authority cannot refuse the execution of the EAW.

Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Levée du sursis)*, Judgment of 23 March 2023

- ***Facts.*** The case arose from a request for a preliminary ruling from the Irish Court of Appeal in the context of proceedings related to the execution of two EAWs in Ireland. They had been issued, respectively, by the Hungarian judicial authorities against LU and by the Polish judicial authorities against PH in order to execute custodial sentences in the issuing Member States. Both cases were related to a custodial sentence which initially had been suspended, but the suspension of these custodial sentence had been revoked on account of a new criminal conviction. The requested persons were not present when these second convictions were handed down nor when the decisions on the revocation of the suspension were taken. The

Hungarian and Polish authorities requested the surrender of respectively LU and PH for the purpose of executing their sentences.

- ***Main questions.*** Does a decision, adopted *in absentia*, revoking a suspension of a custodial sentence constitute a 'decision' within the meaning of Article 4a(1) EAW FD? Does a second criminal conviction, also pronounced *in absentia*, constitute a 'decision' within the meaning of that provision? Must the EAW FD be interpreted as authorising or compelling the executing judicial authority to refuse to surrender the requested person to the issuing Member State or to make his or her surrender subject to the guarantee that the requested person will be entitled, in that Member State, to a retrial or to an appeal, where it is apparent that the *in absentia* proceedings resulting in the revocation of the suspension of the custodial sentence for the execution of which the EAW was issued or in a second criminal conviction of that person, which was decisive for the issue of that warrant, infringed Article 47 or Article 48(2) Charter?
- ***CJEU's reply.*** **Article 4a(1) EAW FD, read in the light of Articles 47 and 48 Charter, must be interpreted as meaning that where the suspension of a custodial sentence is revoked, on account of a new criminal conviction, and an EAW, for the purpose of serving that sentence, is issued, that criminal conviction, handed down in absentia, constitutes a 'decision' within the meaning of that provision. That is not the case for the decision revoking the suspension of that sentence. Article 4a(1) EAW FD must be interpreted as authorising the executing judicial authority to refuse to surrender the requested person to the issuing Member State where it is apparent that the proceedings resulting in a second criminal conviction of that person, which was decisive for the issue of the EAW, took place in absentia, unless the EAW contains, in respect of those proceedings, one of the statements referred to in subparagraphs (a) to (d) of that provision. The EAW FD, read in the light of Article 47 and Article 48(2) Charter, must be interpreted as precluding the executing judicial authority from refusing to surrender the requested person to the issuing Member State, on the ground that the proceedings resulting in the revocation of the suspension of the custodial sentence for the execution of which the EAW was issued took place in absentia, or from making the surrender of that person subject to a guarantee that he or she will be entitled, in that Member State, to a retrial or to an appeal allowing for the re-examination of such a revocation decision or of the second criminal conviction which was handed down against that person in absentia and which proves decisive for the issue of that warrant.** The CJEU's main arguments follow.

- **The concept of 'decision' within the meaning of Article 4a(1) EAW FD**
  - The EAW FD seeks, by the establishment of a simplified and effective system for the surrender of persons to facilitate and accelerate judicial cooperation. The execution of the EAW constitutes the rule, whereas refusal to execute is intended to be an exception which must be interpreted strictly (paras 46-47, with reference to *Puig Gordi and Others*).
  - Article 4a(1) EAW FD must be interpreted and applied in a manner consistent with the second and third paragraphs of Article 47 and with Article 48 Charter (para 51).
  - The concept of 'trial resulting in the decision', within the meaning of Article 4a(1) EAW FD, must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of an EAW (para 52, with reference to *Tupikas*).
  - A decision revoking the suspension of a custodial sentence on account of the breach by the person concerned of an objective condition attached to that suspension, such as the commission of a new offence during the probation period, does not fall within the scope of Article 4a(1) EAW FD.
    - It leaves that sentence unchanged with regard to both its nature and its quantum. The fact that the responsible authority enjoys a margin of discretion

is not relevant, as long as that margin of discretion does not allow it to modify either the quantum or the nature of the custodial sentence, as determined by the decision finally convicting the requested person (paras 53-54, with reference to *Ardic*).
    - That strict interpretation of the concept of 'trial resulting in the decision' within the meaning of Article 4a(1) EAW FD is consistent with the general scheme of the regime established by the EAW FD, with the objective of facilitating and accelerating judicial cooperation and is also consistent with the relevant ECtHR case-law (paras 55-58).
  - A judicial decision which convicted, *in absentia*, the requested person must be regarded as being a 'decision' within the meaning of Article 4a(1) EAW FD, read in the light of Articles 47 and 48 Charter, where its adoption was decisive for the issue of the EAW.
    - The second criminal conviction handed down against both PH and LU obliged or authorised the competent national authority to revoke the suspension of the first custodial sentence imposed on each of those individuals. That revocation itself made it possible to issue the EAWs. Therefore, a criminal conviction handed down *in absentia* in respect of the person who is the subject of an EAW and without which, as is the case here, that warrant could not have been issued constitutes a necessary element for the issue of that warrant, which is liable to be affected by a fundamental defect seriously undermining the right of the accused to appear in person at his or her trial, as guaranteed in the second and third paragraphs of Article 47 and in Article 48 Charter (para 63).
    - If Article 4a(1) EAW FD is not to be rendered largely ineffective, the executing judicial authority must be able to take into account, not only the possible *in absentia* proceedings leading to the final conviction for the execution of which the EAW was issued, but also any other *in absentia* proceedings leading to a criminal conviction without which such a warrant could not have been issued (para 65).
    - The concept of 'trial resulting in the decision' may refer to more than one judicial decision where that is necessary in order to attain the objective pursued by Article 4a(1), which seeks, inter alia, to strengthen the rights of the defence of the persons concerned (para 66).

- **The margin of discretion of the executing judicial authority when assessing an EAW in light of Article 4a(1) EAW FD and the Charter**
  - The executing judicial authority is not allowed to refuse to surrender the person if the EAW contains, as regards the judicial decision which imposed the custodial sentence for the execution of which that warrant was issued, one of the statements referred to in points (a) to (d) of Article 4a(1) EAW FD (para 72).
  - The executing judicial authority is not allowed to refuse to surrender the person if the EAW, in respect of the criminal conviction handed down *in absentia* and without which the suspension of the custodial sentence for the execution of which the EAW was issued, would not have been revoked, contains one of the statements referred to in points (a) to (d) of Article 4a(1) EAW FD (paras 70 and 74).
  - The executing judicial authority is allowed to refuse to surrender the requested person where the EAW does not contain any of the statements mentioned in Article 4a(1)(a) to (d) EAW FD, (para 75). However, that authority must have some discretion as to whether or not it is appropriate to refuse in such a case. He must have the opportunity to take into account the circumstances specific to each case (paras 76-

78, with reference to *X (European arrest warrant – Ne bis in idem); Generalstaatsanwaltschaft Hamburg*).

- The executing judicial authority is not allowed to make the surrender of the person subject to the condition that he will be afforded the right to a retrial as this is not one of the conditions listed in Article 5 EAW FD (para 80). However, that authority may have to seek, by means, if necessary, of a request for supplementary information (Article 15(2) EAW FD), an assurance from the issuing Member State that the person who is the subject of the EAW will be informed that, under the law of the issuing Member State, he or she will be granted the right to a retrial [...]. If such an assurance were given by the issuing Member State, the executing judicial authority would be obliged to surrender the person concerned, in accordance with Article 4a(1)(d) EAW FD (para 82).
- The executing judicial authority is not allowed to refuse to surrender the person on the mere fact that the decision revoking the suspension of the custodial sentence for the execution of which the EAW was issued was adopted *in absentia* as that fact does not constitute one of the grounds for non-execution (para 83).
- However, the executing judicial authority may exceptionally refuse the surrender of the requested person on the basis of Article 1(3) EAW FD in so far it has:
  - first, evidence indicating that there is a real risk of infringement of the fundamental right to a fair trial, guaranteed in Article 47(2) Charter, on account of systemic or generalised deficiencies and
  - second, verified, specifically and precisely, whether, in the light of the personal situation of the requested individual, the nature of the offence in respect of which that person is being prosecuted and the factual context in which the EAW was issued, there are substantial grounds for believing that that person will run such a risk if surrendered to the issuing Member State (para 86, with reference to *Puig Gordi and Others*).
- The executing judicial authority must not give effect to an EAW which does not meet the minimum requirements on which its validity depends, including those laid down in Article 1(1) and Article 8 EAW FD (para 88, with reference to *Puig Gordi and Others*). In the present case, subject to verification by the referring court, there is no evidence to suggest that the EAWs at issue in the main proceedings do not meet those minimum requirements (para 89).

Case C-396/22, *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*, Judgment of 21 December 2023.

- ***Facts.*** Germany received an EAW from Poland for the execution of a 3-year custodial sentence imposed by a Polish Regional Court. This court imposed in its judgment of 30 October 2019 a cumulative sentence which encompasses several sentencing judgments handed down by a Polish District Court, namely a judgment of 25 April 2019, which itself aggregated several sentences previously imposed against the person concerned, and a judgment of 10 June 2019. The person concerned appeared in person or was represented by a court-appointed lawyer in the proceedings leading to the sentences as aggregated by the judgment of 25 April 2019. By contrast, the judgment of 10 June 2019 and the judgment of 30 October 2019 imposing a cumulative sentence were delivered *in absentia*. The German executing court had some questions related to the interpretation of Article 4a(1) EAW FD, which were raised to the CJEU.
- ***Main questions.*** Must proceedings for the subsequent determination of a cumulative sentence still also be considered to fall within the scope of Article 4a(1) EAW FD where the decision is taken by way of a judgment following a hearing, but, in that judgment, the finding of guilt cannot be reviewed and the sentence imposed in respect of the individual offence cannot be amended? Is it compatible with the primacy of EU law for the German legislature to have configured the

case of conviction *in absentia* as an absolute impediment to surrender in national law, even though Article 4a(1) EAW FD provides only for an optional ground for refusal in that regard?

- ***The CJEU's reply*. Article 4a(1) EAW FD must be interpreted as meaning that the concept of 'trial resulting in the decision' encompasses proceedings which led to a judgment imposing a cumulative sentence, by the subsequent aggregation of sentences previously handed down, where, in the context of those proceedings, the authority which delivered that cumulative judgment may neither review the finding of guilt of the person concerned nor amend those previous sentences, but does have a margin of discretion in determining the level of that cumulative sentence. That same provision must be interpreted as meaning that national legislation, transposing that provision, which generally precludes an executing judicial authority from executing an EAW issued for the purposes of executing a sentence, where the person concerned did not appear in person at the trial resulting in the decision concerned, is contrary to that provision of EU law. A national court is required, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret that national legislation, to the greatest extent possible, in the light of the text and the purpose of that framework decision.** The CJEU's main arguments follow.
  - **The concept of 'trial resulting in the decision' encompasses judgments imposing a cumulative sentence if they entail a margin of discretion.**
    - The concept is an autonomous concept of EU law and must be interpreted uniformly throughout the EU (para 26, with references to *Tupikas* and *Ardic*).
    - The concept refers to the proceedings that led to the judicial decision which finally sentenced the person whose surrender is sought (para 27, with reference to *Tupikas* and *Minister for Justice and Equality (Lifting of the suspension)*).
    - In the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given *in absentia*, the concept refers to the instance which led to the last of those decisions, provided that the court concerned made a final ruling on the guilt of the person concerned and imposed a penalty on him or her, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned (para 28, with reference to *Tupikas*).
    - A judgment imposing a custodial sentence modifies the quantum of the penalty or penalties imposed and must, therefore, be distinguished from measures relating to the methods of execution of a custodial sentence. Moreover, a decision consisting of commuting into a single sentence one or more sentences previously handed down in respect of the person concerned will produce a more favourable result for that person. The sentences may be combined to obtain a cumulative sentence which is less than the sum of the various sentences resulting from previous separate decisions (para 30, with reference to *Zdziaszek).*
    - Specific proceedings for the determination of an overall sentence cannot constitute a purely formal and arithmetic exercise, but must entail a margin of discretion in the determination of the level of the sentence, in particular, by taking into account the situation or personality of the person concerned, or any mitigating or aggravating circumstances. It is irrelevant in that regard whether the court concerned has jurisdiction to increase the sentence previously imposed (para 31, with reference to *Zdziaszek*).
    - Proceedings giving rise to a judgment imposing a cumulative sentence, leading to a new determination of the level of custodial sentences previously imposed, must be regarded as relevant for the application of Article 4a(1) EAW FD, where

they entail a margin of discretion for the competent authority and give rise to a decision which finally determines the sentence. This seems to apply in the present case in relation to the judgment of 30 October 2019 (paras 32-33, with reference to *Zdziaszek).*

- **A national provision that does not enable an executing judicial authority to exercise discretion in the event of a conviction *in absentia* is contrary to EU law.**
  - Pursuant to Article 4a(1) EAW FD an executing judicial authority is entitled to refuse to execute an EAW for the purpose of executing a custodial sentence if the person did not appear in person at the trial resulting in the decision concerned, unless the EAW indicates that the conditions set out in subparagraphs (a) to (d) of Article 4a(1) are met (para 39, with reference to *Tupikas*).
  - It follows that an executing judicial authority is obliged to execute an EAW, notwithstanding the absence of the person concerned at the trial resulting in the decision concerned, where one of the situations referred to in subparagraphs (a) to (d) is verified (para 40, with reference to *Tupikas*).
  - As Article 4a provides for a case of optional non-execution, an executing judicial authority may, in any event, even after it has found that the circumstances referred to in subparagraphs (a) to (d) do not cover the situation of the person who is the subject of the EAW, take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his or her rights of defence (para 41, with reference to *Zdziaszek* and *Generalstaatsanwaltschaft Hamburg*).
  - In the context of such an assessment, an executing judicial authority may take into consideration the conduct of the person concerned, such as the fact that the person concerned has sought to avoid service of the information addressed to him or her (para 42, with reference to *Generalstaatsanwaltschaft Hamburg).*
  - When determining that one of the conditions laid down in Article 4a(1) is satisfied, an executing judicial authority must satisfy itself that the rights of defence of the person concerned are respected by taking into account all the circumstances characterising the case before it, including the information which it may itself obtain (para 43).
  - The German legislation at issue in the main proceedings obliges the executing judicial authority concerned, in a general manner, to refuse to execute an EAW in the event of a conviction *in absentia*. That legislation does not leave that executing judicial authority any discretion to determine the existence of one of the situations referred to, respectively, in subparagraphs (a) to (d) of Article 4a(1), on the basis of the circumstances of the case whether the rights of defence of the person concerned may be regarded as having been respected and, consequently, in deciding to execute the EAW concerned. Such legislation is contrary to EU law (paras 44-45).
  - The principle of the primacy of EU law must be interpreted as not requiring a national court to disapply a provision of national law which is incompatible with the provisions of a Framework Decision, since that decision does not have direct effect. However, the authorities of the Member States, including the courts, are required to interpret their national law, to the greatest extent possible, in conformity with EU law, which enables them to ensure an outcome that is compatible with the objective pursued by that framework decision (paras 46-47, with reference to *Popławski).*
  - It will be for the referring court, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret the national legislation at issue in the main proceedings, to the

greatest extent possible, in the light of the text and the purpose of the EAW FD (para 48).

Case C-397/22, *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*, Judgment of 21 December 2023.

- ***Facts.*** Germany received an EAW from Poland for the execution of a 6-month custodial sentence, which has been imposed by a Polish District Court in its judgment of 25 February 2020. By judgment of 16 June 2020, a Polish Regional Court had dismissed the requested person's appeal against the former judgment, without examining the merits of the case. The person concerned did not appear in person either at his trial at first instance or on appeal, and nor was he represented by a lawyer. The person concerned took receipt of the summons to appear at first instance and the grounds for the judgment at first instance, at the address which he had indicated to the competent Polish authorities at the time of his arrest as being his permanent residence. By contrast, the summons to the appeal hearing, sent to that same address, was not received by the person concerned who had lodged an appeal, but by his partner who was also residing at that address. The Polish authorities were unable to prove that she had in fact passed the summons on to him. When assessing the execution of the EAW, the German executing court had some questions related to the interpretation of Article 4a(1) EAW FD which were raised to the CJEU.
- ***Main questions.*** Must an issuing judicial authority prove that the person concerned actually received the summons, or does service on the adult member of the addressee's household prove actual knowledge where the person concerned does not plausibly demonstrate that he or she did not obtain knowledge of the summons? Does the concept of 'trial' relate to the trial which preceded the decision at first instance if only the requested person lodged an appeal and it was dismissed without examination of the merits? Is it compatible with the primacy of EU law if German law configured the case of conviction *in absentia* as an absolute impediment to surrender even though Article 4a(1) provides only for an optional ground for refusal?
- **The CJEU's reply. Where a summons to appear is served on the person concerned by handing it over to an adult member of his or her household, it is under Article 4a(1)(a)(i) EAW FD for the issuing judicial authority concerned to provide proof that the person concerned actually received that summons. The concept of 'trial resulting in the decision' in Article 4a(1) EAW FD relates to appeal proceedings which gave rise to a judgment confirming the decision handed down at first instance and therefore finally disposing of the case. The fact that those appeal proceedings took place without the merits of the case being examined therein is irrelevant in that regard. Article 4a(1) EAW FD must be interpreted as meaning that national legislation, transposing that provision, which generally precludes an executing judicial authority from executing an EAW issued for the purposes of executing a sentence, where the person concerned did not appear in person at the trial resulting in the decision concerned, is contrary to that provision of EU law. A national court is required, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret that national legislation, to the greatest extent possible, in the light of the text and the purpose of that framework decision.** The CJEU's main arguments follow.
  - **The fact that the person concerned did not take receipt of the summons does not constitute an 'absolute impediment' to the execution of the EAW.**
    - 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 the household concerned, who undertook to pass it on to him or her does not in itself, when it cannot be ascertained from the EAW whether and, if so, when that adult actually

passed that summons on to the person concerned, satisfy the conditions set out in Article 4a(1)(a)(paras 31-32, with reference to *Dworzecki*).
- A presumption based on the fact that the adult belonging to the household of the person concerned actually passes on to that person the summons addressed to the latter, would be contrary to the objective of Article 4a(1) EAW FD (paras 33-34, with reference to *Dworzecki*).
- It must be unequivocally established that the third party actually passed the summons on to the person concerned. It is for the issuing judicial authority to indicate in the EAW the evidence on the basis of which it found that the person concerned actually received official information relating to the date and place of his or her trial (paras 34-37, with reference to *Dworzecki*).
- Where an executing judicial authority satisfies itself that the conditions laid down in Article 4a(1)(a) are satisfied, it may also rely on other circumstances that enable it to be assured that the passing on of the summons to the person concerned does not mean a breach of his or her rights of defence, in particular the conduct of the person concerned. Particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he or she sought to avoid service of the information addressed to him or her (para 38, with reference to *Dworzecki*).
- It follows that the fact that the person concerned did not take receipt of the summons to appear in person does not constitute an 'absolute impediment' to the execution of the EAW issued against him or her. Moreover, it cannot be ruled out that an executing judicial authority may reach the conclusion, on the basis of the information provided by the issuing judicial authority concerned in the EAW issued against the person concerned, that such a summons complies, in any event, with the conditions laid down in Article 4a(1) or that, having regard to the circumstances of the case concerned, the rights of defence of the person concerned were, despite the aforementioned circumstance, duly respected and that the surrender of the person concerned is, therefore, lawful (para 39).

- **The concept of 'trial resulting in the decision' relates to appeal proceedings which gave rise to a judgment finally disposing of the case.**
  - The concept is an autonomous concept of EU law and must be interpreted uniformly throughout the EU (para 43, with references to *Tupikas* and *Ardic*).
  - The concept refers to the proceedings that led to the judicial decision which finally sentenced the person whose surrender is sought (para 44, with reference to *Tupikas* and *Minister for Justice and Equality (Lifting of the suspension)*).
  - The decisive factor for the purposes of classifying proceedings as falling within the concept of a 'trial resulting in the decision', is the fact that those proceedings resulted in a judgment constituting a final conviction and which, consequently, finally disposes of the case on the merits (paras 45-48, with reference to *Tupikas*).
  - Appeal proceedings such as those at issue in the main proceedings, which gave rise to a judgment confirming the decision handed down at first instance, without an examination of the merits of the case having been carried out, fall within that concept if they finally dispose of the case concerned, which is, however, a matter for the referring court to determine (para 49).
  - The fact that those appeal proceedings took place without the merits of the case being examined therein is irrelevant in that regard (paras 51-53, with reference to *Tupikas*).
- **A national provision that does not enable an executing judicial authority to exercise discretion in the event of a conviction *in absentia* is contrary to EU law.**

The CJEU applies the same legal reasoning as in Case C-396/22 *Generaalstaatsanwaltschaft Berlin (Condamnation par défaut)*.

Case C-398/22, *Generalstaatsanwaltschaft Berlin (Condamnation par défaut)*, Judgment of 21 December 2023.

- ***Facts.*** Germany received an EAW from Czechia for the execution of a 15-month custodial sentence, which has been imposed by a Czech District Court in a judgment of 19 June 2020, as varied on appeal by a judgment of a Czech Regional Court of 25 August 2020. The judgment delivered on appeal led to a reduction of the sentence imposed at first instance. The person concerned appeared in person at the hearing at first instance. By contrast, the person concerned did not participate in the appeal proceedings, nor was he represented by a lawyer. The summons to the appeal hearing, which had been sent to the address indicated by the person concerned to the competent Czech authorities as being his permanent residence, and at which he had received in person the summons to appear at first instance, was placed in the person concerned's letter box on 17 August 2020 since he had not gone to recover it in person as he had been requested to do so on 3 August 2020. Although there is no evidence that the person concerned actually received that summons to the appeal hearing and he stated that he had moved to Germany in August 2020 without having informed the competent Czech authorities thereof, that summons is, pursuant to the Czech Code of Criminal Procedure, deemed to have been served on the person concerned on the 10th day following the request to recover it. When assessing the execution of the EAW, the German executing court had some questions related to the interpretation of Article 4a(1) EAW FD which were raised to the CJEU.
- ***Main questions.*** Does the concept of 'trial' relate to the trial which preceded the decision at first instance if only the requested person lodged an appeal and it was either dismissed without examination of the merits or the judgment at first instance was varied in his or her favour? Is it compatible with the primacy of EU law if German law configured the case of conviction *in absentia* as an absolute impediment to surrender even though Article 4a(1) provides only for an optional ground for refusal?
- ***The CJEU's reply.*** **Article 4a(1) EAW FD must be interpreted as meaning that appeal proceedings which gave rise to a judgment varying the decision delivered at first instance and thereby finally disposing of the case fall within the concept of 'trial resulting in the decision', within the meaning of that provision. Article 4a(1) EAW FD must be interpreted as meaning that national legislation, transposing that provision, which generally precludes an executing judicial authority from executing an EAW issued for the purposes of executing a sentence, where the person concerned did not appear in person at the trial resulting in the decision concerned, is contrary to that provision of EU law. A national court is required, taking into consideration the whole body of its domestic law and applying the interpretative methods recognised by that law, to interpret that national legislation, to the greatest extent possible, in the light of the text and the purpose of that framework decision.** The CJEU's main arguments follow.
  - **The concept of 'trial resulting in the decision' relates to appeal proceedings which gave rise to a judgment varying the sentence delivered in first instance and finally disposing of the case.**
    - The concept is an autonomous concept of EU law and must be interpreted uniformly throughout the EU (para 28, with references to *Tupikas* and *Ardic*).
    - The concept refers to the proceedings that led to the judicial decision which finally sentenced the person whose surrender is sought (para 29, with reference to *Tupikas* and *Minister for Justice and Equality (Lifting of the suspension)*).
    - The decisive factor for the purposes of classifying proceedings as falling within the concept of a 'trial resulting in the decision', is the fact that those proceedings resulted in a judgment constituting a final conviction and which, consequently,

finally disposes of the case on the merits (paras 30-33, with reference to *Tupikas*).
    - Appeal proceedings such as those at issue in the main proceedings, which gave rise to a judgment varying the decision delivered at first instance and thereby finally disposing of the case concerned – a matter which it is, however, for the referring court to determine – fall within that concept (para 34).
  - **A national provision that does not enable an executing judicial authority to exercise discretion in the event of a conviction *in absentia* is contrary to EU law.**

The CJEU applies the same legal reasoning as in Case C-396/22 *Generaalstaatsanwaltschaft Berlin (Condamnation par défaut)*.

Case C-504/24 PPU, *Anacco*, Order of 20 September 2024.

- ***Facts.*** Belgium issued an EAW against the requested person (RT) for the purpose of enforcing a 2-year custodial sentence imposed by a Belgian first instance court in a judgment of 18 October 2023. This judgment was given *in absentia* following a trial that took place without RT having been actually served with the indictment and, consequently, without her or a lawyer instructed by her or appointed for her by the court being present at the hearing held in the context of those proceedings. The EAW made it clear that, in the event RT's surrender to the Belgian authorities, RT could lodge an objection against the judgment of 18 October 2023 before the Brussels Court of First Instance within a period of 15 days from service of that judgment and that that objection, if declared admissible, would result in that judgment being set aside and a new trial being held, and that she would enjoy the same rights in that new trial as she would have enjoyed in the proceedings which gave rise to that judgment. In addition, RT would have the right to appeal the judgment of 18 October 2023 within 30 days of service of the judgment to the Brussels Court of Appeal, Brussels. The requested person was arrested based on the EAW in Italy. Since the Italian Law which implements the EAW FD does not provide for the possibility of refusing to surrender RT in a situation such as that at issue in the main proceedings, the referring court has doubts as to the compatibility of that law with both Italian constitutional law and EU law. It therefore referred the case to the CJEU.
- ***Main questions.*** Does EU law preclude national legislation such as the Italian legislation, which does not permit the Italian court to refuse the surrender of a person to the issuing State on the basis of a conviction imposing a custodial sentence delivered, in the issuing State, following a criminal trial which took place in the absence of a lawyer of choice appointed by the accused or appointed by the court of its own motion, and in any event without an actual defence, including in cases where – after the execution of the EAW – the convicted person has the right to be served the conviction and may lodge an objection or appeal against that conviction?
- ***The CJEU's reply.*** **Article 4a EAW FD read in the light of Article 6 TEU and Article 47 and Article 48(2) Charter, do not preclude national legislation that does not allow the executing judicial authority to refuse to surrender the person concerned, pursuant to an EAW issued for the purpose of executing a custodial sentence imposed on that person in the issuing State, if that person did not appear in person at the trial resulting in the decision and was not represented by a lawyer appointed by him or her or by a lawyer appointed by the court, and if the conditions laid down in Article 4a(1)(d) are fulfilled.** The CJEU's main arguments follow.
  - **The principles of mutual trust and mutual recognition.**
    - The principle of mutual trust requires a Member State, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and the fundamental rights recognised by EU law (paras 37-39, with

reference to *Puig Gordi and Others, GN (Ground for refusal based on the best interests of the child)*).

- The principle of mutual recognition implies that an executing judicial authority may refuse to execute an EAW on grounds stemming from the EAW FD, as interpreted by the CJEU. While execution of the EAW constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly (paras 40-42, with reference to *GN (Ground for refusal based on the best interests of the child)*).

- **The wording of Article 4a(1) EAW FD.**
  - The executing judicial authority is obliged to execute an EAW, notwithstanding the absence of the person concerned at the trial resulting in the decision, where one of the situations referred to in Article 4a(1)(a), (b), (c) or (d) EAW FD is verified (paras 43-45, with reference to *Generalstaatsanwaltschaft Hamburg*).
  - Article 4a(1)(d) EAW FD is relevant in the present case since it is clear from the reference for a preliminary ruling that RT did not appear in person at the trial resulting in the decision –nor personally received service of that judgment and that the EAW states that she may lodge an objection to that judgment or appeal against it within 15 or 30 days of service, respectively; that provision does not refer to the assistance of a lawyer at that trial (para 46).
  - It does not follow from the wording of Article 4a(1)(d) that the executing judicial authority can refuse to execute an EAW where that warrant is issued against the person concerned following a trial at which that person did not appear in person, on the grounds that he or she was not represented by a lawyer appointed by him or her or appointed by the court. To accept otherwise would thus be tantamount to adding a condition to the EAW FD for the execution of an EAW that was not envisaged by the EU legislature (para 47).
- **The origins and objective of Article 4a(1) EAW FD.**
  - Article 4a(1) EAW FD seeks to guarantee a high level of protection and to allow the executing authority to surrender the person concerned despite that person's failure to attend the trial which led to his or her conviction, while fully respecting the relevant rights of defence (para 48, with reference to *Minister for Justice and Equality (Lifting of the suspension*).
  - In order to ensure that the rights of the defence and access to a lawyer are protected, Article 4a(1)(d)(i) EAW FD requires that a person sentenced *in absentia* be entitled 'to a retrial, or an appeal, in which [that] person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed' (para 50).
  - The EAW FD introduces a system of mutual recognition based on the principle of mutual trust and it does not seek to harmonise national legislation (para 51).
- **Directive 2012/13 and Directive 2013/48.**
  - In so far as the referring court questions whether those directives impose an obligation on the Member States to ensure that suspects or accused persons are assisted by a court-appointed lawyer in a trial that could result in their conviction *in absentia*, that question is irrelevant for the purposes of determining the cases in which refusal to execute an EAW is permitted under Article 4a EAW FD (para 54).
  - According to the CJEU's case-law, any possible non-conformity of the national law of the issuing Member State with the provisions of a directive cannot constitute a ground to refuse the execution of an EAW. Another interpretation would make it possible to circumvent the system established by the EAW FD,

which provides an exhaustive list of the grounds for non-execution (para 55, with reference to *Generalstaatsanwaltschaft Hamburg*).

- **Articles 47 and 48 Charter.**
  - Article 4a EAW FD must be interpreted and applied in a manner consistent with the second and third paragraphs of Article 47 and Article 48 Charter, which correspond to Article 6 ECHR. The CJEU's interpretation must ensure a level of protection which does not disregard that guaranteed by Article 6 ECHR, as interpreted by the ECtHR (para 56, with reference to *Minister for Justice and Equality (Lifting of the suspension)*.
  - The CJEU has already ruled that, in each of the circumstances referred to in Article 4a(1)(a) to (d) EAW FD, the execution of the EAW does not infringe the rights of the defence of the person concerned or the right to an effective judicial remedy and to a fair trial, as enshrined in Article 47 and Article 48(2) of the Charter (para 57, with reference to *Melloni* and *Minister for Justice and Equality (Lifting of the suspension)*).
  - Framework decision 2009/299 effects a harmonisation of the conditions of execution of an EAW in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted *in absentia* who are the subject of an EAW (para 58, with reference to *Melloni*).
- **In the EAW context, the threshold for fundamental rights protection is the EU standard, not a (higher) domestic one.**
  - An executing judicial authority may make the surrender of the person concerned by an EAW to the issuing judicial authority subject only to compliance with the requirements arising from fundamental rights defined by EU law and not to compliance with those arising from its national law. Indeed, the opposite solution would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law, undermine the principles of mutual trust and recognition which the EAW FD is intended to uphold and would, therefore, compromise the efficacy of that framework decision (para 60, with reference to *Melloni* and *Dorobantu*).

7.6. Dual criminality

In relation to the dual criminality condition, the CJEU first of all clarified that, in contrast to the extradition regime, the EAW FD no longer takes account of the levels of punishments applicable in the executing Member State. Therefore, Articles 2(4) and 4(1) EAW FD do not permit an interpretation whereby the surrender is also subject to the condition that the act is punishable by a custodial sentence of a maximum of at least 12 months under the law of the executing Member State (*A*).

As regards the scope of the condition of the double criminality of the act, the CJEU emphasised that, in order to determine whether that condition is satisfied, there is no requirement that the infringements be identical in the two Member States concerned. When assessing that condition, in order to determine whether there is a ground for not executing the EAW, it is for the executing judicial authority to verify whether the factual elements of the offence that gave rise to the issuing of the EAW would also constitute an offence under the law of the executing Member State had they occurred in the territory of that state (*Procureur général près la cour d'appel d'Angers*).

Finally, the CJEU also clarified which version of the law of the issuing Member State has to be considered to ascertain whether the offence for which an EAW has been issued is punishable by a custodial sentence or a detention order for a maximum of at least 3 years in the issuing Member State (Article 2(2) EAW FD). The CJEU clarified that the executing judicial authority must take into account the law of the issuing Member State in the version applicable to the facts giving rise to the case in which the EAW was issued (*X (European arrest warrant – Double criminality)*).

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

- See *supra* 5 (on the scope of the EAW).

Case C-717/18, *X (European arrest warrant – Double criminality)*, Judgment of 3 March 2020.

- See *supra* 5 (on the scope of the EAW).

Case C-168/21, *Procureur général près la cour d'appel d'Angers*, Judgment of 14 July 2022.

- ***Facts.*** In June 2016, the Italian judicial authorities issued an EAW against KL for the purpose of executing a sentence of 12 years and 6 months' imprisonment. That penalty corresponded to the combination of four penalties imposed for four offences, including one described as 'devastation and looting'. The French Court of Appeal of Angers refused KL's surrender on the ground that two of the acts underlying this last infringement – the destruction of an office of Credito Italiano and the destruction of a Fiat Brava car by arson – do not constitute a criminal offence in France. In that regard, the French Court of Cassation, hearing an appeal on a point of law against that refusal decision, had doubts about the interpretation of the double criminality condition. It noted that the constituent elements of the offence of 'devastation and looting' are different in the two Member States concerned in so far as the infringement of public order is an essential element for the purposes of classifying that offence under Italian law, but not under French law.
- ***Main questions.*** Must Articles 2(4) and 4(1) EAW FD be interpreted as meaning that the double criminality condition is satisfied even if an essential element of the offence under the issuing Member State's law ('the disturbance of public order') is not a requirement under the executing Member State's law? If the double criminality condition is fulfilled, may the executing judicial authority refuse to execute the EAW in the light of the principle of proportionality (Article 49(3) Charter)?
- ***The CJEU's reply.*** **Articles 2(4) and 4(1) EAW FD must be interpreted as meaning that the condition of double criminality is satisfied in a situation in which an EAW has been issued for the purpose of executing a custodial sentence imposed for acts that, in the issuing Member State, are covered by an offence that requires that those acts infringe a legal interest protected in that Member State, where such acts are also covered by an offence under the law of the executing Member State, the infringement of which is not a constituent element of that protected legal interest. The same provisions, read in the light of Article 49(3) Charter, must be interpreted as meaning that the executing judicial authority may not refuse to execute an EAW issued for the purpose of executing a custodial sentence on the ground that only some of the acts constituting that offence in the issuing Member State also constitute an offence in the executing Member State.** The CJEU's main arguments follow.
  - **The double criminality condition requires a factual assessment.** The executing judicial authority must verify whether the factual elements of the offence would also constitute a criminal offence under the law of the executing Member State if they had

taken place in the territory of that state (para 36, with reference to *Grundza* [12]). It is irrelevant whether the breach of the legal interest protected under the law of the issuing Member State is also an element of the offence under the law of the executing Member State (paras 49–50).

- The wording of Article 2(4) EAW FD (i.e. 'whatever the constituent elements or classification') confirms that the EU legislature did not require the existence of an exact correspondence between the constituent elements of the offence or the classification of that offence (paras 33–35, with reference to *Grundza*).
- The context of Articles 2(4) and 4(1) EAW FD and the objective pursued by the EAW FD are also in favour of this interpretation.
  - The EAW FD's aim is to facilitate and expedite judicial cooperation. The execution of an EAW is the rule, and refusal to execute one is the exception, which must be interpreted strictly (paras 38–40 and 44, with reference to *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)* and *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)*). In view of the minimum level of harmonisation, an exact similarity is likely to be lacking for a large number of offences (para 46).
  - The EAW FD's aim is to avoid impunity (paras 47–48, with reference to *Openbaar Ministerie (Indépendance de l'autorité judiciaire d'émission)*).

- **The executing judicial authority cannot refuse to execute an EAW on the ground that only some of the acts constituting a single offence in the issuing Member State on which that EAW is based are punishable under the law of the executing Member State.**
  - The EAW FD does not expressly take into account this possibility (para 53).
  - The objectives pursued by the EAW FD confirm this interpretation (paras 57–58 and 61).
  - The scheme of the EAW FD also confirms this interpretation. The execution of an EAW can be made subject to only one of the conditions exhaustively listed in Article 5 EAW FD (paras 59–60, with reference to *X (European arrest warrant – Double criminality)*).
- **The executing judicial authority must not assess, in the context of the assessment of the double criminality condition, the penalty imposed in the issuing Member State in the light of the principle of proportionality (Article 49(3) Charter).**
  - The EAW FD ensures the issuing judicial authority's compliance with the principle of proportionality of criminal offences and penalties (para 65, with reference to *Piotrowski* and *IK (Enforcement of an additional sentence)*).
  - The disproportionate nature of the sentence imposed in the issuing Member State is not one of the grounds for non-execution of an EAW (para 66).
  - The double criminality condition involves only verifying whether the factual elements of the offence would have been punishable under the law of the executing Member State if they had taken place there (para 67).

[12] Case C-289/15, *Grundza*, Judgment of 11 January 2017. In this judgment, the CJEU interpreted Framework Decision 2008/909 on the transfer of sentenced persons. The CJEU held at 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'.

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

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

- ***Facts.*** In 2016, the competent authorities in the United Kingdom issued two EAWs in respect of RO for the purposes of conducting prosecutions of the offences of murder, arson and rape. RO was arrested in Ireland on the basis of these arrest warrants and has been held in custody since 3 February 2016. RO raised objections to his surrender by Ireland to the United Kingdom on the basis, among other things, of issues related to the United Kingdom's withdrawal from the EU. He argued that he is exposed to the risk that a number of the rights he enjoys under the Charter and Articles 26–28 EAW FD may no longer be respected after the withdrawal of the United Kingdom from the European Union.
- ***Main question.*** Must Article 50 TEU be interpreted as meaning that a consequence of the notification by a Member State of its intention to withdraw from the European Union in accordance with that article is that, in the event that that Member State issues an EAW with respect to an individual, the executing Member State must refuse to execute that EAW or postpone its execution pending clarification as to the law that will apply in the issuing Member State after its withdrawal from the European Union?
- ***The CJEU's reply.*** **Article 50 TEU must be interpreted as meaning that mere notification by a Member State of its intention to withdraw from the European Union does not have that consequence. In the absence of substantial grounds to believe that the person who is the subject of that EAW is at risk of being deprived of rights recognised by the Charter, following the withdrawal from the European Union of the issuing Member State, the executing Member State cannot refuse to execute that EAW while the issuing Member State remains a member of the European Union.** The CJEU's main arguments follow.
  - **Mutual recognition and mutual trust are the rule** (paras 36–38).
    - Article 1(1) and 1(2) EAW FD and recitals 5 and 7 indicate that the EAW FD constitutes a completely new regime based on mutual recognition and mutual trust.
    - An EAW must in principle be executed unconditionally, unless one of the grounds for non-recognition (Articles 3, 4 and 4a EAW FD) or one of the guarantees (Article 5 EAW FD) applies.
  - **Exceptions to the rule are allowed only in exceptional circumstances** (paras 39 and 40, with reference to *Aranyosi and Căldăraru* and *Minister for Justice and Equality (Deficiencies in the System of Justice)*).
  - **A mere notification by a Member State of its intention to withdraw from the European Union cannot be regarded as an 'exceptional circumstance'** (paras 44–48).
    - A notification given under Article 50 TEU does not have the effect of suspending the application of EU law in the Member State that has given the notification. EU law continues in full force and effect in that Member State until the time of its actual withdrawal from the European Union.
    - A refusal to execute an EAW would be the equivalent of unilateral suspension of the provisions of the EAW FD and would run counter to the wording of recital 10 of that EAW FD, which states that it is for the European Council to determine a breach in the issuing Member State of the principles set out in Article 2 TEU with a view to an EAW being suspended.
  - **The executing judicial authority must examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds to believe that, after withdrawal from the EU, the person is at risk of being deprived of their fundamental rights and the EAW FD related rights** (paras 49–51).

- **In the present case, the executing judicial authority is able to presume that, with respect to the person who is to be surrendered, the issuing Member State will apply the substantive content of the rights derived from the EAW FD that are applicable in the period subsequent to the surrender, after the withdrawal of that Member State from the European Union** (paras 52–61).
  - The United Kingdom is party to the ECHR and its continuing participation to that convention is not linked to its being a member of the EU.
  - The United Kingdom is party to the 1957 European Convention on Extradition and has incorporated in its national law other rights and obligations currently contained in the EAW FD.

8. Guarantees

The CJEU has repeatedly held that that the execution of the EAW may be made subject only to the conditions exhaustively laid down in Article 5 EAW FD. The rulings summarised in the present chapter mostly relate to the application of Article 5(3) EAW FD. This provision allows the executing authority to subject the execution of an EAW issued for the purposes of prosecution of a person who is a national or resident of the executing Member State to the guarantee that the requested person is returned to the executing Member State to serve there the custodial sentence or detention order passed against them in the issuing Member State. The CJEU holds that the return of the person concerned must take place as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence or to the proper administration of justice make the presence of the person essential in the issuing Member State until any procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW (e.g. confiscation) have been definitively closed (*SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution)*). Furthermore, the CJEU has ruled that where the execution of the EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909 (*SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'execution).* The CJEU also clarified that a Member State cannot exclude, absolutely and automatically, third-country nationals staying or resident in their territory from benefiting from a return guarantee under Article 5(3) EAW FD (*PY (Ressortissant d'un État tiers dans l'État membre d'exécution)*).

In 2010, the CJEU clarified that an EAW for the execution of a sentence imposed *in absentia* may be subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD (*IB*). However, this judgment was ruled prior to the entry into force of Council Framework Decision 2009/299/JHA (on enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial), which deleted Article 5(1) EAW FD and introduced Article 4a EAW FD. More recently, the CJEU ruled in relation to *in absentia* judgments that the executing judicial authority is not allowed to make the surrender of a requested person subject to the condition that he will be afforded the right to a retrial. This is not [any longer] [13] one of the conditions listed in Article 5 EAW FD. However, the executing judicial authority may have to seek, by means, if necessary, of a request for supplementary information (Article 15(2) EAW FD), an assurance from the issuing Member State that the person who is the subject of the EAW will be informed that, under the law of the issuing Member State, he or she will be granted the right to a retrial (*Minister for Justice and Equality (Levée du sursis)*).

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

- ***Facts.*** A Romanian court sentenced IB, a Romanian national, to 4 years' imprisonment for the offence of trafficking in nuclear and radioactive substances. The court ordered that the sentence, upheld on appeal, was to be served under a system of supervised release. Later, the Romanian

[13] Article 5(1) of the original text of the EAW FD, was in this regard amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p. 24–36.

Supreme Court upheld the sentence imposed on IB but ordered that it be served in custody. The decision of the Supreme Court was rendered *in absentia* and IB was not personally notified of the date or place of the hearing which led to the decision. IB fled to Belgium and the Romanian court of first instance issued an EAW for the arrest of IB with a view to executing the sentence of 4 years' imprisonment. The Belgian court was uncertain whether the EAW should be characterised as a warrant for the execution of a sentence or as a warrant for the purposes of prosecution. The decision as to which way to characterise it had important consequences: if it was a warrant for the execution of a sentence, IB could not apply to serve the sentence in Belgium for the situation does not concern the execution of a final judgment; by contrast, if it was a warrant for the purposes of prosecution, the Belgian authorities could make the surrender subject to the condition that IB should subsequently be returned to Belgium, his country of residence. The case was brought before the Belgian Constitutional Court, which made a reference to the CJEU for a preliminary ruling.

- ***Main question.*** Must Articles 4(6) and 5(3) EAW FD be interpreted as meaning that the execution of an EAW issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing Member State, as the case may be, to serve there the sentence passed against them following a new trial organised in the person's presence in the issuing Member State?
- ***The CJEU's reply.*** **Articles 4(6) and 5(3) EAW FD must be interpreted as meaning that the execution of an EAW issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of Article 5(1) EAW FD may be subject to the condition that the person concerned, a national or resident of the executing Member State, should be returned to the executing Member State, as the case may be, to serve there the sentence passed against them, following a new trial organised in the person's presence in the issuing Member State. An executing Member State may make the surrender of a person in a situation such as that of IB subject to the joint application of the conditions laid down in Articles 5(1) and 5(3) EAW FD.** The CJEU's main arguments follow.
  - Articles 3 to 5 EAW FD make it possible for the Member States to allow the competent judicial authorities, in specific situations, to decide that a sentence must be executed on the territory of the executing Member State (para 51).
  - Articles 4(6) and 5(3) EAW FD have the objective of increasing the requested person's chances of reintegrating into society (para 52).
  - There is no indication in the EAW FD that persons requested on the basis of a sentence imposed *in absentia* should be excluded from that objective (para 53).
  - The mere fact that Article 5(1) EAW FD makes the execution of an EAW issued following a decision rendered *in absentia* subject to a retrial guarantee cannot have the effect of rendering inapplicable to that same EAW Articles 4(6) and/or 5(3) EAW FD (para 55).
  - The situation of a person who was sentenced *in absentia* and to whom it is still open to apply for a retrial is comparable to that of a person who is the subject of an EAW for the purpose of prosecution and Article 5(3) EAW FD can therefore apply thereto (para 57).
  - That interpretation avoids putting the person in a situation where they would waive their right to a retrial in the issuing Member State to ensure that their sentence may be executed in the Member State where they are resident pursuant to Article 4(6) EAW FD (para 59).

Case C-314/18, *SF (Mandat d'arrêt européen – Garantie de renvoi dans l'État d'exécution)*, Judgment of 11 March 2020.

- ***Facts.*** On 3 March 2017, the Canterbury Crown Court issued an EAW against SF, a Dutch national, in view of his prosecution for two offences of conspiracy to import drugs into the

United Kingdom. The executing authority in the Netherlands requested the issuing authority to supply the guarantee under Article 5(3) EAW FD. The United Kingdom answered by undertaking to return SF to the Netherlands as soon as possible after the sentencing process had been completed and 'any other proceedings in respect of the offence for which extradition was sought are concluded', which would include the eventual proceedings for confiscation. Furthermore, the United Kingdom also noted that the transfer of SF did not allow the Netherlands to alter the duration of any sentence imposed by a United Kingdom court. The referring court in the Netherlands considered that such guarantee does not satisfy the conditions imposed by both the EAW FD and FD 2008/909. Therefore, it was of the opinion that surrender should be refused. However, the Netherlands harboured doubts as to the time at which the issuing Member State must implement the guarantee to return the person to the executing Member State. Furthermore, because its national legislation allows the foreign criminal sentence to be converted into a sentence normally applicable in the Netherlands, it also called into question whether, on the basis of Article 25 FD 2008/909, the executing Member State can adapt the custodial sentence or detention order imposed in the issuing Member State beyond what is allowed under Article 8(2) FD 2008/909. It therefore referred the case to the CJEU.

- ***Main questions.*** Must Article 5(3) EAW FD be interpreted as meaning that the executing Member State is under an obligation to return the surrendered person not only when the sentencing of the person concerned has become final but also when any other procedural step coming within the scope of the criminal proceedings relating to the offence underlying the EAW has been definitely closed? Must Article 25 FD 2008/909 be interpreted as meaning that, when the execution of an EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can, by way of derogation from Article 8(2) FD 2008/909, adapt the duration of the sentence imposed in the issuing Member State to make it correspond to the sentence that would have been imposed for the offence in question in the executing Member State?
- ***CJEU's reply.*** **Article 5(3) EAW FD must be interpreted as meaning that the issuing Member State must return the person subject to the EAW as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence of the person concerned or to the proper administration of justice make the person's presence essential pending a definitive decision on any procedural step coming within the scope of the criminal proceedings relating to the offence underlying the EAW. Article 25 FD 2008/909 must be interpreted as meaning that, when the execution of an EAW is subject to the condition set out in Article 5(3) EAW FD, the executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909.** The CJEU's main arguments follow.
  - **The person must return as soon as the sentencing decision has become final, unless concrete grounds relating to the rights of the defence or the proper administration of justice require the person's presence.**
    - Article 5(3) EAW is silent on this issue. Article 5(3) EAW FD merely provides that the return of the person concerned is to take place after the person concerned has been heard in the issuing Member State (paras 44 and 45).
    - The coordination between EAW FD and FD 2008/909 requires that the return of the person concerned to the executing Member State should occur as soon as possible after the sentencing decision has become final (para 54):
      - Article 5(3) EAW and Article 3(1) of FD 2008/909 seek to facilitate the social rehabilitation of the person concerned (paras 47–51);
      - pursuant to its Articles 3(3) and 1(a), FD 2008/909 is applicable only to final judgments (paras 52 and 53);

- pursuant to Article 3(3) FD 2008/909, the fact that, in addition to the sentence, a fine or confiscation order has been imposed, which has not yet been paid, recovered or enforced, is not to prevent the sentence from being forwarded to the executing Member State (para 55).

- **The objective of facilitating the social rehabilitation of the person concerned must be balanced against both the effectiveness of the criminal prosecution for the purpose of ensuring a complete and effective punishment of the offence and the safeguarding of the procedural rights of the person concerned** (para 56).
  - Under Article 1(3) EAW FD and Article 3(4) FD 2008/909, those framework decisions cannot have the effect of modifying the obligation to respect fundamental rights and principles under EU law (paras 57 and 58).
  - The judicial authority of the issuing Member State may assess whether concrete grounds relating to the safeguarding of the rights of the defence or to the proper administration of justice make the presence of the person concerned essential in the issuing Member State after the sentencing decision has become final and until such time as a final decision has been taken on any other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW (para 59).
  - It is not open to the judicial authority of the issuing Member State systematically and automatically to postpone the return of the person concerned to the executing Member State until the other procedural steps coming within the scope of the criminal proceedings relating to the offence underlying the EAW have been definitively closed (para 60).
  - In the balancing exercise, the judicial authority of the issuing Member State must take into account the possibility of applying cooperation and mutual assistance mechanisms provided for in the criminal field under EU law (para 61).

- **The executing Member State can adapt the duration of the sentence imposed in the issuing Member State only within the strict conditions set out in Article 8(2) FD 2008/909.**
  - Article 8(2) FD 2008/909 lays down strict conditions governing the adaptation by the executing Member State of the sentence imposed by the issuing Member State, which are the sole exceptions to the obligation to recognise the judgment and to enforce the sentence (paras 64 and 65).
  - The interpretation that Article 25 FD 2008/909 allows exceptions to those limits where an EAW is subject to the condition under Article 5(3) EAW FD would render entirely ineffective the principle of mutual recognition (para 66).
  - The executing Member State cannot refuse to surrender the person concerned where the issuing Member State makes a reservation with regard to the possibility that the sentence is not adapted beyond the situations contemplated in Article 8(2) FD 2008/909 (para 67).

Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Levée du sursis)*, Judgment of 23 March 2023.

➢ See *supra* 7.5 (on *in absentia* judgments).

Case C-636/22 *PY (Ressortissant d'un État tiers dans l'État membre d'exécution)*, Order of 16 November 2023.

- ***Facts.*** A French Court issued an EAW for prosecution against PY, an Afghan national. An Italian Court of Appeal ordered in a first judgment the requested person's surrender. The Italian Supreme Court of Cassation partially set aside that judgment arguing that the Court of Appeal should have determined first whether PY was an Italian or third country national who could benefit from a return guarantee under the Italian law provisions which transpose Article 5(3) EAW FD. The Appeal Court again ordered, in a second judgment, the surrender of PY arguing that the issue of actual settlement by PY in Italy did not arise as he was neither an Italian nor an EU citizen. The Italian Supreme Court of Cassation also set aside the second judgment arguing that the establishment of the requested person in Italy had not been adequately assessed. The Court of Appeal then sent a preliminary question to the CJEU asking about a potential incompatibility of Article 18 bis and 19 of Law No 69/2005 with Article 5(3) EAW FD. Those national provisions do not allow the executing judicial authority, when the requested person is a third-country national residing in Italy, to make the surrender conditional on, after being heard, that person being returned to Italy in order to serve the custodial sentence or detention order imposed upon him or her by the issuing Member State.
- ***Main questions.*** Does Article 5(3) EAW FD interpreted in the light of Article 1(3) EAW FD and of Article 7 of the Charter, preclude legislation, such as the Italian legislation, that – in the context of an EAW procedure for the purposes of conducting a criminal prosecution – absolutely and automatically precludes the executing judicial authorities from refusing to surrender third-country nationals staying or residing in Italy territory, irrespective of the links those individuals have with that territory? If the answer to the first question is in the affirmative, what criteria and assumptions are used to establish that such links are to be regarded as so significant as to require the executing judicial authority to refuse surrender?
- ***The CJEU's reply.*** **Article 5(3) EAW FD, read in conjunction with the principle of equality before the law, enshrined in Article 20 of the Charter, must be interpreted as precluding a national law that prevents, absolutely and automatically, the executing judicial authority from making the surrender of a third-country national residing in the territory of that Member State subject to the condition that that person, after being heard, is returned to that Member State for the purposes of the execution of the custodial sentence or detention order imposed on him or her in the issuing Member State. In order to assess whether it is appropriate to make the execution of the EAW issued against a third-country national who is resident in the territory of the executing Member State subject to the condition in Article 5(3) EAW FD, the executing judicial authority must make an overall assessment of all the specific elements that characterise that national's situation which are capable of showing that there are, between that person and the executing Member State, connections demonstrating that he or she is sufficiently integrated into that State such that the execution in that Member State of the custodial sentence or detention order pronounced against that person in the issuing Member State will contribute to increasing the chances of social rehabilitation after that sentence or detention order has been executed. Those elements include the family, linguistic, cultural, social or economic links that the third-country national has with the executing Member State as well as the nature, duration and conditions of his or her stay in that Member State.** The CJEU's main arguments follow.
    - The interpretation requested in the present case can clearly be deduced from existing case-law, particularly the CJEU's judgment in *O.G. (Mandat d'arrêt européen à l'encontre d'un ressortissant d'un Etat tiers)*. [14] In this judgment, the CJEU interpreted Articles 1(3)

[14] See *supra* 7(2) (on refusal grounds – nationals, residents and persons staying in the executing Member State).

and 4(6) EAW FD and held that the discretion available to Member States when transposing the grounds for optional non-execution is not unlimited (para 22 and paras 25-35, with reference to *O.G.*).

- Article 5(3) does not contain any indication that would justify the situation of a third-country national being distinguished from that of a Union citizen. Consequently, a third-country national, who is the subject of an EAW for the purposes of conducting a criminal prosecution and who resides in the executing Member State, is in a situation comparable with that of a national of that Member State or that of a national of another Member State who resides in that Member State and is the subject of such a warrant. It follows that, in accordance with Article 20 of the Charter, the situations of those people cannot be treated differently (para 36).
- As regards the objective of Article 5(3) EAW FD, it must be noted that that provision aims to increase the chances of social reintegration of the national or resident of the executing Member State by allowing him or her to serve, in its territory, the custodial sentence or detention order which, after his or her surrender, under an EAW, would be imposed in the issuing Member State (para 37, with reference to *SF (European arrest warrant – Guarantee of return to the executing State)*).
- It is clear from the order for reference that Articles 18 bis and 19 of Law No 69/2005, which transpose Article 5(3) EAW FD into Italian law, restrict, in essence, the application of that provision solely to Italian nationals and nationals of other Member States, so that third country nationals are excluded, absolutely and automatically, from benefiting from that provision, without any discretion being left in that regard to the executing judicial authority (para 38).
- In light of the wording and purpose of Article 5(3) EAW FD, the overall assessment referred to by the CJEU in *O.G.* in relation to Article 4(6) EAW FD must also be made in the context of the application of Article 5(3) EAW FD (paras 42 and 43, with reference to *O.G.*).

9. Time limits

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

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

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

The CJEU also clarified the time limits for surrender of the person mentioned in Article 23 EAW FD (*Vilkas*). The CJEU interpreted the '*force majeure*' concept as referring only to abnormal and unforeseeable circumstances that were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care (*Vilkas*). The bringing of legal actions does not constitute a situation of *force majeure* (*C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*). The CJEU also clarified that authorities remain obliged to agree on a new surrender date if the time limits mentioned in Article 23 EAW FD have expired (*Vilkas*). A police service cannot be made responsible for assessing whether there is a situation of *force majeure* and the setting of a new surrender date (*C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*). If the time limits have expired and the requested person is still in custody, he or she must be released (*C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*). However, the executing authority must take any measure it deems necessary to prevent that person from absconding, with the exception of measures involving deprivation of liberty (*C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*).
The CJEU also ruled that where a decision on a postponed surrender has not been taken by a competent judicial authority and the time limits referred to in Article 23(2) to (4) have expired, the person who is the subject of the EAW must be released, in accordance with Article 23(5) EAW FD (*Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)*, see *supra* Section 3.3).

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

- ***Facts.*** An issuing judicial authority from the United Kingdom sent an EAW for the surrender of the requested person, Lanigan, to an Irish executing judicial authority. Criminal proceedings were brought against him in the United Kingdom for murder and possession of a firearm. Lanigan was detained in Ireland while he fought the execution of the EAW on different grounds. At one of the hearings, Lanigan submitted that the request for surrender should be rejected

because the time limits stipulated in the EAW FD had not been complied with. The Irish court decided to stay the proceedings and referred the case to the CJEU.

- ***Main questions.*** Does a failure to observe the time limits stipulated in Article 17 EAW FD preclude the executing court from taking a decision on the execution of the EAW? And does it preclude that authority from keeping the person in custody where the total duration of the period that person has spent in custody exceeds those time limits?
- ***The CJEU's reply.*** **Articles 15(1) and 17 EAW FD must be interpreted as meaning that the executing judicial authority remains required to adopt the decision on the execution of the EAW after expiry of the time limits stipulated in Article 17. Article 12 EAW FD, read in conjunction with Article 17 EAW FD and in the light of Article 6 Charter, must be interpreted as not precluding, in such a situation, the holding of the requested person in custody, in accordance with the law of the executing Member State, even if the total duration for which that person has been held in custody exceeds those time limits, provided that that duration is not excessive in the light of the characteristics of the procedure followed in the case in the main proceedings, which is a matter to be ascertained by the national court. If the executing judicial authority decides to bring the requested person's custody to an end, that authority is required to attach to the provisional release of that person any measures it deems necessary so as to prevent the person from absconding and to ensure that the material conditions necessary for their effective surrender remain fulfilled for as long as no final decision on the execution of the EAW has been taken.** The CJEU's main arguments follow.
  - **Even after expiry of the time limits, the executing authority must adopt a decision on the execution of the EAW.**
    - The wording, context and objective of Article 15(1) EAW FD support this interpretation (paras 35 and 36).
    - The central function of the obligation to execute the EAW and the absence of any explicit indication as to a limitation of the temporal validity of the obligation to execute the EAW in the EAW FD support this interpretation too (paras 36 and 37).
    - Article 17(7) EAW FD shows that the EU legislature considered that in a situation in which time limits have not been observed the execution of the EAW is postponed, not abandoned (para 38).
    - Article 17(5) EAW FD includes obligations that makes sense only if the executing authority remains required to adopt the decision on the execution of the EAW after expiry of the time limits (para 39).
    - An opposite interpretation would run counter to the objective of the EAW FD because it could force the issuing authority to issue a second EAW or it could encourage delaying tactics aimed at obstructing the execution of EAWs (paras 40 and 41).
  - **Even after expiry of the time limits, the requested person can, in principle, be kept in custody** (paras 43–52).
    - Article 12 EAW FD does not require that the requested person is released following the expiry of the time limits of Article 17 EAW FD (paras 43–46).
    - There is a clear difference in consequences with regard to the expiry of time limits between Article 23(5) EAW FD (the requested person 'shall be released') and Article 17(5) EAW FD (time limits 'may be extended').
    - If it is assumed that after the expiry of the time limits the executing authority must still adopt a decision on the execution of the EAW, a release of the requested person could limit the effectiveness of the surrender and obstruct the objectives pursued by the EAW FD.

- Article 26 EAW FD (on the deduction of periods of detention served in the executing Member State) also supports this interpretation.

- **The requested person can be kept in custody only within the limits of Article 6 Charter** (paras 53–60).
  - Article 12 EAW FD must be read in the light of Article 6 Charter (right to liberty and security of person).
  - In the light of Article 6 Charter, the requested person can be held in custody only if the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and insofar as the duration of the custody is not excessive.
  - The executing judicial authority needs to carry out a concrete review of the situation at issue, taking account of all the relevant factors, including possible failure to act on the part of the authorities of the Member States concerned; any contribution of the requested person to the duration; the sentence potentially faced by the requested person or delivered in their regard in relation the acts which lead to the issuing of the EAW; the potential risk of the person absconding; and the fact that the person has been held in custody for a period the total of which greatly exceeds the time limits stipulated in Article 17 EAW FD.
- **If the person is provisionally released, measures might need to be implemented until a final decision on the execution of the EAW has been taken** (para 61). If, after the review, the executing judicial authority concludes that it must bring the requested person's custody to an end, it is required, in the light of Articles 12 and 17(5) EAW FD, to attach to the provisional release of that person any measures it deems necessary to prevent them from absconding and to ensure that the material conditions necessary for their effective surrender remain fulfilled.

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

- ***Facts.*** Vilkas was a subject of two EAWs issued by a Lithuanian court. The Irish authorities attempted to surrender him to the Lithuanian authorities by using a commercial flight. However, he was not allowed on the flight because of the resistance he put up. Two weeks later, a second surrender attempt, also by means of a commercial flight, failed following a series of similar events. The Irish Minister for Justice and Equality then applied to the High Court (Ireland) for authorisation for a third attempt at surrendering Vilkas. However, the High Court held that it lacked jurisdiction to hear this application and ordered Vilkas's release. The Minister for Justice and Equality brought an appeal against that judgment before the Court of Appeal, which stayed the proceedings and referred the case to the CJEU.
- ***Main question.*** Does Article 23 EAW FD preclude, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities from agreeing on a new surrender date where the repeated resistance of the requested person has prevented his surrender within 10 days of the new, agreed surrender date?
- ***The CJEU's reply.*** **Article 23(3) EAW FD must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, the executing and issuing judicial authorities agree on a new surrender date under that provision where the surrender of the requested person within 10 days of a first new surrender date agreed on pursuant to that provision proves impossible on account of the repeated resistance of that person, insofar as, on account of exceptional circumstances, that resistance could not have been foreseen by those authorities and the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities, which is for the referring court to ascertain. Articles 15(1) and 23 EAW FD must be interpreted as meaning that those authorities remain obliged to agree on a new**

surrender date if the time limits prescribed in Article 23 have expired. The CJEU's main arguments follow.

- In the event of *force majeure*, where two previous surrender attempts failed, a third surrender day must be set.
  - **Rule and exceptions** (paras 21–24). Article 23(2) EAW FD states that the requested person is to be surrendered no later than 10 days after the final decision on the execution of the EAW, but this rule is subject to certain exceptions, particularly in the case of *force majeure* (Article 23(3) EAW FD).
  - **The wording of Article 23(3) EAW FD** (paras 25–29). This provision does not expressly limit the number of new surrender dates that may be agreed on between the authorities concerned in cases of *force majeure*. It also does not exclude the setting a new surrender date where surrender has failed more than 10 days after the final decision on the execution of the EAW.
  - **The objective of Article 23 EAW FD** (paras 30–33). This provision is aimed at accelerating judicial cooperation by imposing time limits for adopting EAW decisions.
  - Article 23(3) EAW FD read in the light of Article 23(5) EAW FD (paras 34–39).
- **In the event of *force majeure*, the requested person can be kept in custody only within the limits of Article 6 Charter** (para 43, with reference to *Lanigan*).
- **The concept of *force majeure* must be interpreted strictly and refers to unforeseeable circumstances whereby the consequences could not have been avoided in spite of the exercise of all due care** (paras 44–65).
  - The fact that certain requested persons put up resistance to their surrender cannot, in principle, be classified as an 'unforeseeable' circumstance.
  - A fortiori, if the requested person has already resisted a first surrender attempt, the fact that they also resist a second surrender attempt cannot normally be regarded as unforeseeable.
  - It is, however, for the referring court to assess whether there were 'exceptional circumstances' on the basis of which it is objectively apparent that the resistance put up by the requested person could not have been foreseen by the authorities concerned and that the consequences of the resistance for the surrender could not have been avoided in spite of the exercise of all due care by those authorities.
- **If the referring court cannot classify the case as a case of '*force majeure*', the authorities are still required to agree on a new surrender date** (paras 66–72).
  - The principle of mutual recognition imposes an obligation, in principle, to execute the EAW, and there is no limitation of the temporal validity of that obligation in the EAW FD.
  - Article 23(5) EAW FD foresees that, in cases of expiry of the time limits, the requested person is to be released if they are still being held in custody. This provision does not confer any other effect on the expiry of those time limits. It does not provide that the expiry deprives the authorities concerned of the possibility of agreeing on a surrender date nor that it releases the executing Member State from the obligation to give effect to an EAW.
  - The objective of the EAW FD of accelerating and simplifying judicial cooperation also supports this interpretation.

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

- ***Facts.*** Dutch authorities arrested TC in the Netherlands based on an EAW issued by the United Kingdom. The United Kingdom suspected TC of having been involved as a senior member of an organised crime group in the importation, sale and supply of hard drugs. The Netherlands

transposed Article 17 EAW FD in such a way that the executing judicial authority must, in all cases, suspend the detention pending surrender of the requested person once the 90-day period for taking a final decision on the execution of the EAW has expired (Article 22(4) of the Dutch law on the surrender of sentenced persons). The referring Dutch court was of the opinion that the obligation to always release the arrested person after 90 days is not in line with EU law. Therefore, it developed case-law that interprets the Dutch law as meaning that, in certain circumstances, the decision period is suspended. Such suspension applies, for instance, when the executing judicial authority decides to refer a question to the CJEU for a preliminary hearing. It also applies if the executing authority decides to await the reply to a question referred for a preliminary ruling by another executing judicial authority or if it decides to postpone the decision on surrender due to a real danger of inhumane detention conditions in the issuing Member State.

- ***Main question.*** Does the maintenance of the detention pending surrender of a requested person who represents a flight risk, once the detention has continued for more than 90 days after that person's arrest, contravene Article 6 Charter?
- ***CJEU's reply.*** **The EAW FD precludes a national provision that lays down a general and unconditional obligation to release a requested person arrested pursuant to an EAW as soon as a period of 90 days from that person's arrest has elapsed where there is a very serious risk of that person absconding and that risk cannot be reduced to an acceptable level by the imposition of appropriate measures. Article 6 Charter precludes national case-law that allows the requested person to be kept in detention beyond that 90-day period on the basis of an interpretation of that national provision according to which that period is suspended when the executing judicial authority decides to refer a question to the CJEU for a preliminary ruling, or to await the reply to a request for a preliminary ruling made by another executing judicial authority, or to postpone the decision on surrender on the ground that there could be, in the issuing Member State, a real risk of inhuman or degrading detention conditions, insofar as that case-law does not ensure that that national provision is interpreted in conformity with the EAW FD and entails variations that could result in different periods of continued detention.** The CJEU's main arguments follow.
  - **Purpose and wording of the EAW FD.**
    - The EAW FD seeks, by the establishment of a simplified and more effective system for the surrender of persons, to facilitate and accelerate judicial cooperation. The objective of accelerating judicial cooperation is present, inter alia, in the time limits for adopting decisions relating to an EAW (paras 40–42).
    - There are circumstances that may result in the surrender procedure lasting more than 90 days (para 43).
    - Neither Article 12 nor any other provision of the EAW FD provide that, following the expiry of the time limits stipulated in Article 17, the executing judicial authority is required to release that person provisionally or, a fortiori, to release them purely and simply (para 46, with reference to *Lanigan*).
    - A general and unconditional obligation to release the requested person on expiry of the time limits could limit the effectiveness of the surrender system, particularly if there is a very serious risk of absconding that cannot be reduced to an acceptable level by appropriate measures (paras 47–49).
  - **Non-observance of time limits and duty to provide information to the issuing judicial authority and to Eurojust/Council.** Any suspension of the period for taking a final decision on the execution of the EAW is permissible only if the executing judicial authority complies with the duty to provide information pursuant to Article 17(4) and (7) EAW FD.

- **Article 12 EAW FD must be interpreted in conformity with Article 6 Charter (right to liberty and security).**
  - Account must be taken of Article 5(1) ECHR for the purpose of interpreting Article 6 Charter as the minimum threshold of protection (para 57).
  - It follows from the case-law of the ECtHR that the fact that any deprivation of liberty must be lawful means not only that it must have a basis in national law but also that that law must be sufficiently accessible, precise and predictable in its application to avoid all risks of arbitrariness (para 58).
  - Individuals arrested in the Netherlands with a view to their surrender are faced with provisions of national law (Article 22(4) of the Dutch surrender law) and EU law (Articles 12 and 17 EAW FD), which are incompatible with each other. They are also confronted with variations in the case-law of the Dutch courts concerning that provision of Dutch law and its interpretation in conformity with EU law (para 75). That variation in national case-law does not make it possible to determine, with the clarity and predictability required by the CJEU's case-law, the period for which a requested person is to be kept in detention in the Netherlands in the context of an EAW issued for them (para 76).

Case C-804/21 PPU, *C and CD (Obstacles juridiques à l'exécution d'une décision de remise)*, Judgment of 28 April 2022.

- ***Facts.*** In 2015, a Romanian judicial authority issued EAWs against two Romanian nationals (C and CD) for the purpose of executing prison sentences imposed for the trafficking of very dangerous narcotics and for participation in a criminal organisation. The initial proceedings for the execution of the EAWs took place in Sweden, but C and CD fled to Finland, where they were arrested and placed in detention. In April 2021, the Finnish Supreme Court ordered their surrender to Romania. The Finnish National Bureau of Investigation initially set a surrender date of 7 May 2021. C and CD's air transport to Romania could not be organised before that date on account of the COVID-19 pandemic. A second surrender date was set for 11 June 2021. However, the surrender was once again postponed owing to air transport issues. Surrender dates were set for a third time, 17 June 2021 for CD and 22 June 2021 for C. However, it was once again impossible to proceed with that surrender, this time because C and CD had lodged applications for international protection in Finland. C and CD then brought an action seeking, first, their release on the ground that the time limit for surrender had expired and, second, the postponement of their surrender on account of their applications for international protection. Those actions were declared inadmissible. These inadmissibility decisions were then challenged before the Finnish Supreme Court, which put two questions to the CJEU.
- ***Main questions.*** Does the concept of *force majeure* extend to legal obstacles to surrender that arise from legal actions brought by the requested persons and are based on the law of the executing Member State, such as a request for asylum? Is the requirement of intervention on the part of the executing judicial authority met where the executing Member State makes a police service responsible for ascertaining whether there is a situation of *force majeure* and for deciding on a new surrender date? If not, must the time limits be regarded as having expired, with the result that the requested persons must be released?
- ***The CJEU's reply.*** **Article 23(3) EAW FD must be interpreted as meaning that the concept of *force majeure* does not extend to legal obstacles to surrender that arise from legal actions brought by the person who is the subject of the EAW and are based on the law of the executing Member State, in cases where the final decision on surrender has been adopted by the executing judicial authority. The requirement of intervention on the part of the executing judicial authority is not met where the executing Member State makes a police service responsible for ascertaining whether there is a situation of *force majeure***

and whether the necessary conditions for the continued detention of the person who is the subject of the EAW are satisfied, and for deciding on a new surrender date, even if that person is entitled at any time to apply to the executing judicial authority for a decision on the abovementioned matters. Article 23(5) EAW FD must be interpreted as meaning that the time limits must be regarded as having expired, with the result that that person must be released, where the requirement of intervention on the part of the executing judicial authority has not been met. The CJEU's main arguments follow.

- **Legal actions cannot constitute a case of *force majeure*.**
  - The concept of *force majeure* must be applied strictly, referring to abnormal and unforeseeable circumstances that were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care (paras 44–45, with reference to *Vilkas*).
  - The bringing of legal actions by the requested person, in the context of proceedings provided for by the national law of the executing Member State, with a view to challenging or delaying his or her surrender to the authorities of the issuing Member State, cannot be regarded as an unforeseeable circumstance (para 47).
- **A police service cannot be made responsible for assessing whether there is a situation of *force majeure* and the setting of a new surrender date** (para 63).
  - The concept of 'executing judicial authority' within the meaning of Article 6(2) EAW FD refers, as does the concept of 'issuing judicial authority' within the meaning of Article 6(1) EAW FD, to a judge or a court, or a judicial authority, such as the public prosecution service of a Member State, that participates in the Member State's administration of justice and enjoys the necessary independence vis-à-vis the executive (para 61, with reference to *Openbaar Ministerie (Faux en écritures)*).
  - The police services of a Member State cannot be covered by the concept of 'judicial authority' within the meaning of Article 6 EAW FD (para 62, with reference to *Openbaar Ministerie (Faux en écritures)*).
  - The intervention on the part of a central authority must be limited to providing practical and administrative assistance to the competent judicial authorities. The possibility envisaged in Article 7 EAW FD cannot extend to permitting Member States to substitute that central authority for the competent judicial authorities in relation to the assessment of whether there is a situation of *force majeure*, and, if applicable, the setting of a new surrender date (paras 64–65, with reference to *Poltorak*).
- **If time limits have expired, the requested person, if still in custody, must be released, but measures must be taken to prevent that person from absconding.**
  - Where there is no intervention on the part of the executing judicial authority, the time limits laid down in Article 23 EAW FD cannot be validly extended and, in a situation such as that at issue in the main proceedings, those time limits must be regarded as expired (paras 67–69).
  - It is clear from the wording of Article 23(5) EAW FD that a person who is the subject of an EAW, if he or she is still being held in custody, must, if those time limits have expired, be released. No provision is made for an exception to that obligation on the part of the executing Member State in such a case (para 71).
  - The EU legislature did not confer any other effect on the expiry of those time limits and did not, in particular, provide that their expiry deprives the authorities concerned of the possibility of agreeing on a surrender date or that it releases the executing Member State from the obligation to give effect to an EAW (para 74).

- Having regard to the obligation of the executing Member State to continue the procedure for executing an EAW, the competent authority of that Member State is required, if the person who is the subject of that warrant is released, to take any measures it deems necessary to prevent that person from absconding, with the exception of measures involving deprivation of liberty (para 75).

Case C-492/22 PPU, *Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)*, Judgment of 8 December 2022.

- See *supra* 3.3 (on judicial authority, judicial decision and effective judicial protection) and *infra* 11 (on postponed surrender).

10. Requests for additional information

In a number of judgments, the CJEU referred to Article 15(2) EAW FD and gave concrete examples where an executing judicial authority can request additional information which it considers necessary to enable it to make a decision on the surrender. Such information can, inter alia, relate to information on the reason why the EAW does not mention a national arrest warrant (*Bob-Dogi*), information on the conditions in which it is envisaged that the individual concerned will be detained in the issuing Member State (e.g. *Aranyosi and Căldăraru; ML* (*Conditions of detention in Hungary*); *Dorobantu; Breian*), information on the detention conditions of mothers of young children and the care of those children *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, information on independence of the judiciary (*Minister for Justice and Equality* (*Deficiencies in the System of Justice*)), information on rules on jurisdiction and judicial procedure applicable in the issuing Member State (*Puig Gordi and Others*), information that rules out a real risk of a significant reduction in the requested person's life expectancy or of a rapid, significant and irreversible deterioration in their state of health (*E.D.L. (Motif de refus fondé sur la maladie)*), 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/assurances in relation to *in absentia* judgments (e.g. *Tupikas; Minister for Justice and Equality (Levée du sursis*) or information on consent in a case of subsequent surrender (e.g. *Melvin West*). In some of these cases, particularly where decisions were based on an analysis of the law of the issuing Member State or detention conditions in that State, the executing judicial authority cannot, without infringing the principle of sincere cooperation, make certain findings and refuse the execution of an EAW without having first requested that the issuing judicial authority provide further information concerning those issues (*Puig Gordi and Others; Breian*). The same applies in the context of the TCA (*Alchaster*).

In cases related to fundamental rights grounds where the executing judicial authority considers it does not have objective, reliable, specific and properly updated information to establish that the first step of the two-step test is met, the CJEU clarified that a request for additional information is not justified (*Puig Gordi and Others*).

In some judgments, the CJEU recalled that Member States are required to comply with the time limits for adopting decisions relating to an EAW (Article 17 EAW FD) and underlined that recourse to Article 15 EAW FD (requests for necessary, supplementary information) may be had only as a last resort in exceptional cases (e.g. *ML* (*Conditions of detention in Hungary*); *Piotrowski; Dorobantu; Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution); Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*).

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

- See *supra* 7.3 (on *ne bis in idem*).

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

- See *supra* 3 (on the content and validity of the EAW).

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

- See *supra* 6 (on human rights scrutiny).

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

- See *supra* 7.5 (on *in absentia* judgments).

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

- See *supra* 7.1 (on minors).

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

- See *supra* 6 (on human rights scrutiny).

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

- See *supra* 6 (on human rights scrutiny).

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

- See *supra* 6 (on human rights scrutiny).

Joined cases C-428/21 PPU and C-429/21 PPU, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, Judgment of 26 October 2021.

- See *supra* 6 (on human rights scrutiny).

Joined Cases C-562/21 PPU and C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*, Judgment of 22 February 2022.

- See *supra* 6 (on human rights scrutiny).

Joined Cases C-514/21 and C-515/21, *Minister for Justice and Equality (Levée du sursis)*, Judgment of 23 March 2023.

- See *supra* 7.5 (on *in absentia* judgments).

Case C- 158/21, *Puig Gordi and Others*, Judgment of 31 January 2023.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling by an issuing judicial authority), 3.3 (on the validity of the EAW), 4 (on the obligation to execute the EAW) and 6 (on human rights scrutiny).
- ***Facts.*** See *supra* 6 (on human rights scrutiny).
- ***Main question***. Can the executing judicial authority refuse to execute an EAW without having first requested that the issuing judicial authority provide supplementary information?
- ***CJEU's reply*. Article 15(2) EAW FD precludes the executing judicial authority from refusing to execute an EAW on the ground that the requested person is at risk, following his or her surrender to the issuing Member State, of being tried by a court lacking jurisdiction for that purpose, without having first requested that the issuing judicial authority provide supplementary information.** The CJEU's main arguments follow.
  - The duty of sincere cooperation (Article 4(3) TEU) requires that the issuing and executing judicial authorities, in order to ensure effective cooperation in criminal matters, make full use of the instruments provided for in Article 15 EAW to foster the mutual trust on which that cooperation is based (paras 131–132, with reference to *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission).*
  - An executing judicial authority may only refuse to execute an EAW on the ground that the requested person is at risk of being tried in the issuing Member State by a court lacking jurisdiction on the condition that that executing judicial authority has found, in

the light of the rules on jurisdiction and judicial procedure applicable in the issuing Member State, that the court that will likely be called upon to hear the requested person's proceedings manifestly lacks jurisdiction. Since such a finding is necessarily based on an analysis of the law of the issuing Member State, the executing judicial authority cannot, without infringing the principle of sincere cooperation, make that finding without having first requested that the issuing judicial authority provide information concerning those rules (paras 133–134).

- However, a request for additional information is not justified where the executing judicial authority considers that it does not have objective, reliable, specific and properly updated information to establish that there are systemic or generalised deficiencies in the operation of the judicial system of that Member State or deficiencies affecting the judicial protection of an objectively identifiable group of persons to which the person concerned belongs. That judicial authority cannot, in such a case, refuse to execute an EAW on the ground that the court that will likely be called upon to try that person manifestly lacks jurisdiction (para 135).

Case C-699/21, *E.D.L. (Motif de refus fondé sur la maladie)*, Judgment of 18 April 2023.

- See *supra* 6 (on human rights scrutiny) and *infra* 11 (on postponed surrender).

Case C-261/22, *GN (Motif de refus fondé sur l'intérêt supérieur de l'enfant)*, Judgment of 21 December 2023.

- See *supra* 6 (on human rights scrutiny).

Case C-202/24, *Alchaster*, Judgment of 29 July 2024.

- See *supra* 6 (on human rights scrutiny).

Case C-318/24 PPU, *Breian*, Judgment of 29 July 2024.

- See also *supra* 2 (on the admissibility of a request for a preliminary ruling by an issuing judicial authority) and 6 (on human rights scrutiny).
- ***Facts.*** See *supra* 6 (on human rights scrutiny).
- ***Main questions.*** Can the executing judicial authority refuse to execute the EAW on the basis of information which has not been brought to the attention of the issuing judicial authority and in respect of which the latter has not had the opportunity to provide supplementary information?
- ***The CJEU's replies.*** **When examining detention conditions in the issuing Member State, the executing judicial authority cannot refuse to execute an EAW on the basis of information concerning the detention in the issuing Member State which it has obtained itself, and in respect of which it has not requested supplementary information from the issuing judicial authority.** The CJEU's main arguments follow.
  - In accordance with the principle of sincere cooperation, the Member States are, in full mutual respect, to assist each other in carrying out tasks which flow from the Treaties (para 110, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*.
  - Before concluding whether surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 Charter, the executing judicial authority must submit a request for information to the issuing judicial authority and the issuing judicial authority is obliged to provide that information

(paras 106-107, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary* and para 112).

- If, upon receipt, the information is insufficient to conclude on the existence of a real risk, the executing judicial authority must, pursuant to Article 15 (2) EAW FD, request the necessary supplementary information as a matter of urgency. In addition, the issuing judicial authority may at any time forward any additional useful information to the executing judicial authority (Article 15(3) EAW FD).
- The executing judicial authority cannot disregard information provided by the issuing judicial authority solely on the basis of information which the executing judicial authority obtained from publicly available sources, without requesting supplementary information from the issuing judicial authority (para 116).

11. Postponed surrender

The CJEU has clarified different aspects related to the postponement of the surrender under Article 23(4) EAW FD for serious humanitarian reasons (*E.D.L. (Motif de refus fondé sur la maladie)*) and under Article 24(1) EAW FD for ongoing investigations against the requested person in the executing Member State (*Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)*). In both cases, the CJEU has underlined that the decision to postpone (or not to postpone) the surrender is an option within the discretionary powers of the executing judicial authority, but it has to be exercised in compliance with the Charter.

As regards, Article 23(4) EAW FD, the CJEU clarified that surrender must exceptionally be postponed where there are substantial and established grounds for believing that that surrender would expose that person to a real risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health in violation of Article 4 Charter. The executing authority must ask to the issuing judicial authority all information relating to the conditions under which it intends to prosecute or detain that person and to the possibility of adapting those conditions to his or her state of health in order to prevent such a risk from materialising. If that risk cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the EAW (*E.D.L. (Motif de refus fondé sur la maladie)*).

As regards Article 24(1) EAW FD, different factors can be relevant when taking the decision on postponement, e.g. the interest of the executing Member State in completing the criminal proceedings relating to that person, the interest of the issuing Member State in obtaining that person's surrender without delay for the purposes of conducting a criminal prosecution or the execution of a sentence relating to the offence which is the subject of the EAW and the seriousness of the offences committed in those Member States. The CJEU also confirmed that the requested person can be kept in detention on the basis of the EAW whilst the criminal prosecution is being conducted in the executing Member State, provided that the surrender procedure has been conducted in a sufficiently diligent manner and the duration of detention is accordingly not excessive. Finally, the CJEU also reminded the referring court of the possibility to consider a temporary surrender (Article 24(2) EAW FD) as an alternative to the postponement of the surrender.

Case C-492/22 PPU, *Openbaar Ministerie (Décision de remise différée en raison de poursuites pénales)*, Judgment of 8 December 2022.

- See also *supra* 3.3 (on judicial authority, judicial decision and effective judicial protection) and 9 (on time limits).
- ***Facts.*** See *supra* 3.3.
- ***Main questions.*** Can a person, who is the subject of an EAW and whose surrender was postponed for the purposes of a criminal prosecution instituted against him/her in the executing Member State, be kept in detention there on the basis of the EAW whilst the criminal prosecution in question is being conducted? Can the executing judicial authority postpone the surrender of a person who is the subject of an EAW for the purposes of a criminal prosecution instituted against that person in the executing Member State solely on the ground that that person has not waived their right to appear in person before the courts seized in connection with that prosecution? If so, what factors must the executing judicial authority take into account when deciding on the postponement of surrender?

- ***CJEU's reply.*** **Articles 12 and 24(1) EAW FD, read in conjunction with Article 6 Charter, must be interpreted as not precluding a person who is the subject of an EAW, whose surrender to the authorities of the issuing Member State has been postponed for the purposes of a criminal prosecution instituted against him in the executing Member State, from being kept in detention on the basis of the EAW whilst the criminal prosecution is being conducted. Article 24(1) EAW FD, read in conjunction with the second and third paragraphs of Article 47 and Article 48(2) Charter, must be interpreted as not precluding the postponement of the surrender of a person who is the subject of an EAW, for the purposes of a criminal prosecution instituted against that person in the executing Member State, solely on the ground that that person has not waived their right to appear in person before the courts seised in connection with that prosecution.** The CJEU's main arguments follow.
  - **Keeping the requested person, whose surrender has been postponed, in detention on the basis of the EAW whilst the criminal prosecution is being conducted.**
    - The wording of Articles 12 and 24(1) EAW FD does not preclude the continued detention of a person who is the subject of an EAW in accordance with the national law of the executing Member State, where he or she is prosecuted in that Member State for an offence committed in that Member State other than that covered by that warrant (paras 68–70).
    - The postponed surrender constitutes a special rule distinct from the arrangements for executing the surrender provided for in Article 23 EAW FD. Therefore, the time limits stipulated in Article 23(5) EAW FD do not apply in the case of a postponed surrender. On the basis of Article 12 EAW FD, the executing judicial authority may decide to continue to hold the person who is the subject of an EAW in detention (paras 72–73).
    - This interpretation contributes to the attainment of the objectives of the EAW FD, which seek, inter alia, to combat impunity (para 74, with reference to *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*).
    - This interpretation is also consistent with Article 6 Charter (para 76).
    - Where the executing judicial authority decides to postpone the surrender pursuant to Article 24(1) EAW FD, Article 6 Charter allows that authority to decide to keep the requested or sentenced person in detention only in so far as the surrender procedure has been conducted in a sufficiently diligent manner and the duration of detention is accordingly not excessive. In order to ensure that that is indeed the case, that authority will have to carry out a specific review of the situation at issue, taking into account all relevant factors (para 82, with reference to *Vilkas*).
  - **Discretion of executing judicial authority and elements to consider when deciding on the postponement of the surrender.**
    - Article 24(1) EAW FD grants the executing judicial authority discretion in the adoption of a decision to postpone surrender. The exercise of this discretion is subject only to the condition that that decision be adopted for the purpose of conducting a criminal prosecution in the executing Member State or the serving of a sentence passed for an act other than that referred to in the EAW (para 86).
    - Article 24(1) EAW FD must be interpreted in a manner consistent with the requirements of respect of fundamental rights (para 87).
      - The right of an accused person to appear in person at the trial constitutes an essential element of the right to a fair trial enshrined in the second and third paragraphs of Article 47 and Article 48(2) Charter. It requires the Member States to guarantee the accused the right to be present at

the hearing during his trial (para 88, with reference to *HN (Trial of an accused person removed from the territory)*).

- If the executing Member State were to decide not to postpone, they would have to accept all the consequences arising from the respect of that right in the organisation of that person's trial, with a view to ensuring that that person has a genuine opportunity to attend (para 89, with reference to *HN (Trial of an accused person removed from the territory)*).

- The considerations which may be relevant for the purposes of deciding to postpone the surrender include, in particular, the interest of the executing Member State in completing the criminal proceedings relating to that person, the interest of the issuing Member State in obtaining that person's surrender without delay for the purposes of conducting a criminal prosecution or the execution of a sentence relating to the offence which is the subject of the EAW and the seriousness of the offences committed in those Member States (para 92).
- The executing judicial authority may, instead of postponing surrender, temporarily surrender the requested person to the issuing Member State, under conditions to be determined by mutual agreement between the executing and issuing judicial authorities (Article 24(2) EAW FD). In that regard, it could be agreed, inter alia, that the requested person would be returned to the executing Member State for the purposes of prosecution in that State (para 93).

Case C-699/21, *E.D.L. (Motif de refus fondé sur la maladie)*, Judgment of 18 April 2023.

- See also *supra* 6 (on human rights scrutiny).
- ***Facts.*** Croatian judicial authorities issued an EAW against E.D.L. for the purpose of his prosecution. After assessment by a psychiatrist, the Italian executing authority found that he was suffering from a psychotic disorder and that his surrender would cause his general health to deteriorate, the effects of which could be exceptionally serious, and could even lead to an increased risk of suicide. It also noted that the Italian provisions transposing the EAW FD do not provide that such reasons linked to health can constitute a ground for refusing surrender. It therefore asked the Italian Constitutional Court whether those provisions were compatible with the constitution. The Italian Constitutional Court, noting that also the EAW FD does not provide for a similar ground for refusal, even in case of chronic illnesses of potentially indefinite duration, raised the question to the CJEU.
- ***Main question.*** Does Article 1(3) EAW FD, read in the light of Articles 3, 4 and 35 Charter, mean that, where the executing judicial authority called upon to decide on the surrender of a person suffering from a serious chronic and potentially irreversible illness concludes that that surrender could expose that person to the risk of suffering serious harm to his or her health, it must request from the issuing judicial authority the information enabling such a risk to be ruled out and is required to refuse to execute that surrender if it does not obtain, within a reasonable period of time, the assurances required to rule out that risk?
- ***The CJEU's reply.*** **Articles 1(3) and 23(4) EAW FD, read in the light of Article 4 Charter, must be interpreted as meaning that where there are substantial grounds to believe that the surrender of a requested person manifestly risks endangering his or her health, the executing judicial authority may, exceptionally, postpone that surrender temporarily. Where the executing judicial authority concludes that there are substantial and established grounds for believing that that surrender would expose that person to a real risk of a significant reduction in his or her life expectancy or to a rapid, significant and irreversible deterioration in his or her state of health, it must postpone that surrender and ask the issuing judicial authority to provide all information relating to the conditions under which it intends to prosecute or detain that person and to the possibility of**

adapting those conditions to his or her state of health in order to prevent such a risk from materialising. If it appears that that risk cannot be ruled out within a reasonable period of time, the executing judicial authority must refuse to execute the EAW. On the other hand, if that risk can be ruled out within such a period of time, a new surrender date must be agreed with the issuing judicial authority. The CJEU's main arguments follow.

- **In exceptional circumstances where the life or health of the requested person is manifestly endangered, surrender may be postponed under Article 23(4) EAW FD** (para 36).
  - The principle of mutual trust implies that Member States, save in exceptional circumstances, may not check whether another Member State has, in a specific case, observed the fundamental rights guaranteed by the EU (paras 30–31).
  - Member States are required to execute any EAW on the basis of the principle of mutual recognition and may refuse to execute it only on grounds stemming from the EAW FD; while the execution of the EAW constitutes the rule, refusal to execute is an exception to be interpreted strictly (paras 33–34).
  - The EAW FD does not provide that Member States may refuse to execute an EAW solely on the ground that the requested person suffers from a serious, chronic and potentially irreversible illness. The principle of mutual trust entails the presumption that the care and treatment provided in the Member States for the management of such illnesses will be adequate (para 35).
  - However, under Article 23(4) EAW FD the executing authority is authorised to postpone temporarily the surrender of the requested person, provided that there are serious reasons for believing, on the basis of objective material, such as medical certificates or expert reports, that surrender manifestly risks endangering the health of that person, for example because of the temporary illness or condition of that person (paras 36–37).
- **By way of exception, where there are substantial grounds to believe that the surrender of the requested person, who is seriously ill, would expose him or her to a real risk of significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health in violation of Article 4 Charter, surrender must be postponed** (para 42).
  - The discretion under Article 23(4) EAW FD must be exercised in accordance with Article 4 Charter, which prohibits inhuman and degrading treatment, since such prohibition is absolute and it cannot be ruled out that the surrender of a person who is seriously ill may cause that person to be exposed to a real risk of inhuman and degrading treatment, where it reaches a minimum level of severity exceeding the unavoidable level of suffering inherent in detention (para 38–40).
  - That is true of the surrender of a person who is seriously ill where he or she is at risk of imminent death or where there are substantial grounds for believing that, although not at imminent risk of dying, he or she would face a real risk, in the circumstances of the case, of suffering a serious, rapid and irreversible decline in his or her state of health or a significant reduction in life expectancy (para 41).
  - In such situation, the executing authority is required, in accordance with Article 4 Charter, to exercise the power provided for in Article 23(4) EAW FD by deciding to postpone the surrender (para 42).
- **In such situations, the executing authority must ask to the issuing authority all information necessary to ensure that the manner in which the criminal proceedings on which the EAW is based will be conducted or the conditions of any detention of that person make it possible to rule out the risk of inhuman or degrading treatment** (para 47).

- Article 23(4) EAW FD must not be interpreted in such a way as to call into question the effectiveness of the EAW system (paras 43–44).
- The duty of sincere cooperation laid down in Article 4(3) TEU must inform the dialogue between the executing judicial authorities and the issuing ones, making full use of the instruments provided in the EAW FD to foster mutual trust (paras 45–46).
- Where the executing judicial authority decides, by way of exception, to postpone temporarily the surrender of the requested person on the basis of Article 23(4) EAW FD, it must ask the issuing judicial authority to provide it with all the information necessary to ensure that the manner in which the criminal proceedings on which the EAW is based will be conducted or the conditions of any detention of that person make it possible to rule out the risk of a significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health (para 47, with reference to *Aranyosi and Căldăraru*).
- If such safeguards are provided by the issuing authority, the EAW must be executed and a new date for surrender must be set (para 48).
- The assurances from the issuing authority must also be requested in the case of the chronic and potentially long-lasting nature of the exceptionally serious illness suffered by the requested person (para 49).

- **If, in exceptional circumstances, that risk cannot be ruled out within a reasonable period of time, the executing authority must refuse to give effect to the EAW** (para 52).
  - In exceptional circumstances, in the light of the information provided by the issuing judicial authority, and of any other information available to the executing judicial authority, it cannot be ruled out that there are substantial and established grounds for believing that surrender would expose him or her to a real risk of significant reduction in his or her life expectancy or of a rapid, significant and irreversible deterioration in his or her state of health, in violation of Article 4 Charter, and that that risk cannot be ruled out within a reasonable period of time (para 50).
  - In such situations, it would be contrary to the wording of Article 23(4) EAW, which refers to the 'temporary' nature of the postponement of the surrender, for an executing judicial authority to defer the surrender of a requested person for a considerable or even indefinite period of time, and the requested person could remain indefinitely subject to the EAW issued against him or her, even though there is no realistic prospect that that person will be surrendered to the issuing Member State (para 51).
  - Under Article 1(3) EAW FD, the existence of a risk of infringement of fundamental rights is capable of permitting the executing judicial authority to refrain, exceptionally and following an appropriate examination, from giving effect to an EAW (paras 52–53).

12. Effects of the surrender

The CJEU has clarified in its case-law different aspects related to the effects of the surrender. First, the CJEU gave some guidance as to the interpretation of the term 'detention' of Article 26(1) EAW FD particularly in light of the obligation to deduce period of detentions served in the executing Member State (*JZ*). Next, the CJEU provided guidance on different aspects related to the speciality rule of Article 27 EAW FD (*Leymann and Pustovarov*; *Generalbundesanwalt beim Bundesgerichtshof* (*Speciality rule*); *The Minister for Justice and Equality (Demande de consentement – Effets du mandat d'arrêt européen initial)*). In the context of subsequent surrender as regulated in Article 28(2) EAW FD, the CJEU clarified which Member State needs to give consent (*Melvin West*). The CJEU also clarified to what extent a Member State can provide for an appeal with suspensive effect against a decision to execute an EAW or in the context of Articles 27 or 28 EAW FD (*Jeremy F*). Finally, the CJEU also clarified how the requested person's right to be heard can be ensured both in relation to a request for an extension of the offences and in relation to a request for onward surrender (*Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*).

12.1. Deduction of period of detention served in the executing Member State

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

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

- **Conform interpretation** (paras 32 and 33). The CJEU recalls the duty to interpret national law, as much as possible, in the light of the wording and purpose of the EAW FD.
- The term '**detention**' of Article 26(1) EAW FD is an **autonomous concept of EU law.** This concept must be interpreted uniformly throughout the EU, taking into account the wording, context and objective pursued by the legislation in question (paras 35–37).
- **Article 26(1) EAW FD refers not to a measure that restricts liberty but to one that deprives a person of it** (paras 38–47). After assessing the wording, context and objective of Article 26 EAW FD, the CJEU concluded that one should distinguish between measures that restrict liberty (in principle not included in Article 26) and measures that deprive a person of their liberty (included in Article 26). The concept 'detention' of Article 26(1) EAW FD therefore includes, apart from imprisonment, other measures that, owing to their nature, duration, effects and means of implementation, deprive the person concerned of their liberty in a way that is comparable to imprisonment.
- **The ECtHR's case-law supports this interpretation** (paras 48–52).
- **The assessment is to be made by the issuing judicial authority** (paras 53–56).
  - It is for the issuing judicial authority to assess the measures taken against the person concerned in the executing Member State and to consider whether these measures must be treated in the same way as a deprivation of liberty and therefore constitute 'detention'. The issuing judicial authority can ask the executing judicial authority to send it all the necessary information. In the course of that assessment, the judicial authority of the Member State which issued the EAW may, under Article 26(2) EAW FD, ask the competent authority of the executing Member State to transmit any information it considers necessary.
  - In principle, a 9-hour daily curfew monitored by means of an electronic tag does not seem to have the effect of depriving a person of their liberty within the meaning of Article 26(1) EAW FD.
  - Article 26(1) EAW FD imposes a minimum level of protection. An issuing judicial authority can decide, on the basis of national law alone, to deduct from the total period of detention all or part of the period during which that person was subject, in the executing Member State, to measures involving not a deprivation of but a restriction of liberty.

12.2. Speciality rule

The CJEU first of all interpreted the concept 'offence other than for which the surrender was surrendered' (Article 27(2) EAW FD) and also noted that 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 (*Leymann and Pustovarov*).

Next, the CJEU provided guidance on the assessment to be made by the executing judicial authority before giving consent under Article 27(4) EAW FD. Such a decision to grant consent requires an examination which is separate and independent from the prior assessment on the EAW. The executing judicial authority must verify whether: (i) the request for consent is accompanied by the information referred to in Article 8(1) EAW FD and a translation; (ii) the offence for which consent is requested is itself subject to the surrender obligation and (iii) the extension of the prosecution to the other offences may be authorised. The executing judicial authority should not review the conditions under which the prior surrender was carried out, e.g. whether it was issued by a competent issuing judicial authority in the context of an assessment of a request for consent under Article 27 EAW FD

(*The Minister for Justice and Equality (Demande de consentement – Effets du mandat d'arrêt européen initial)*).

In the context of the executing judicial authority's assessment, the CJEU also acknowledged that the person's right to be heard should be ensured. The CJEU agreed though that a hearing for that purpose can take place in the *issuing* Member State, without the executing judicial authority participating directly, provided that the issuing judicial authorities ensures that the surrendered person's right to be heard is exercised effectively. It is for the executing judicial authority to ensure that it has sufficient information, in particular as regards the position of the person concerned, to be able to take its decision, in full knowledge of the facts and in full respect of the rights of the defence of the person concerned (*Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*).

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

- ***Facts.*** Leymann and Pustovarov were wanted for illegal import of drugs into Finland. The Finnish authorities sent EAWs that indicated that Leymann and Pustovarov were suspected of committing a serious drug trafficking offence which related to a large quantity of amphetamines. Leymann and Pustovarov were surrendered to the Finnish authorities on the basis of those EAWs and were remanded in custody. Later, the indictment against Leymann and Pustovarov stated that the serious drug trafficking offence concerned not amphetamines but hashish. Leymann and Pustovarov were both convicted and sentenced to imprisonment. They both appealed and argued that they had been convicted for an offence other than that for which they had been surrendered, contrary to the 'speciality rule'. The Finnish Supreme Court referred a number of questions on the exact scope of the speciality rule to the CJEU.
- ***Main questions.*** How must the expression 'offence other than for which the person was surrendered' (hereinafter 'other offence') of Article 27(2) EAW FD be interpreted and when is consent in accordance with Article 27(4) EAW FD required? Does a modification of the description of the offence – which concerns only the kind of narcotics in question – fall within the classification of 'other offence' and thus require consent from the executing authority? How must the exception to the speciality rule in Article 27(3)(c) EAW FD be interpreted, taking into account the consent procedure laid down in Article 27(4) EAW FD?
- ***CJEU's reply.*** **To establish whether the offence under consideration is an 'other offence' within the meaning of Article 27(2) EAW FD, it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing Member State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, insofar as they derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 EAW FD. In circumstances such as those in the main proceedings, a modification of the description of the offence concerning the kind of narcotics concerned is not, of itself, to define an offence other than that for which the person was surrendered within the meaning of Article 27(2) EAW FD. The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that, where there is an offence other than that for which the person was surrendered, consent must be requested, in accordance with Article 27(4) EAW FD, and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that**

no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Article 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained where that restriction is lawful on the basis of other charges which appear in the EAW. The CJEU's main arguments follow.

- The expression 'other offence' requires a comparison between the description of the offence in the EAW and in the later procedural document to assess whether (paras 55 and 57).
  - The constituent elements of the offence, according to the legal description given by the issuing Member State, are those for which the person was surrendered.
  - There is a sufficient correspondence between the information given in the EAW and that contained in the later procedural document.
- **The speciality rule does not require consent for every modification of the description of the offence** (paras 56 and 57).
  - Consent for every modification would go beyond what is implied by the speciality rule and interfere with the objective of speeding up and simplifying judicial cooperation as pursued by the EAW FD.
  - Modifications concerning the time or place of the offence are allowed if they:
    - derive from evidence gathered in the course of the proceedings conducted in the issuing Member State concerning the conduct described in the EAW;
    - do not alter the nature of the offence;
    - do not lead to grounds for non-execution under Articles 3 and 4 EAW FD.
- **A modification of the description of the offence concerning the kind of narcotics is not, of itself, to define an 'other offence'** (paras 61–63).
  - The indictment relates to the importation of hashish whereas the EAW refers to the importation of amphetamines.
  - The offence is still punishable by imprisonment for a maximum period of at least 3 years.
  - The offence comes under the category 'illegal trafficking in narcotic drugs' of Article 2(2) EAW FD.
- **The exception in Article 27(3)(c) EAW FD must be interpreted as meaning that** (paras 73–76):
  - when there is an 'other offence', consent must, in principle, be requested and obtained if a penalty or a measure involving the deprivation of liberty is to be executed;
  - a measure restricting liberty can be imposed on the person before consent has been obtained if the restriction is lawful on the basis of other charges which appear in the EAW;
  - the person can be prosecuted and sentenced for the 'other offence' before consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when the judgment is given for that offence;
  - if, after judgment has been given, the person is sentenced to a penalty or a measure restricting liberty, consent is required to enable that penalty to be executed.

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

- ***Facts.*** XC was prosecuted in Germany in three separate sets of criminal proceedings. First, in 2011, he was sentenced to a combined custodial sentence of 1 year and 9 months. That sentence

was suspended on probation. Second, in 2016, criminal proceedings were instituted in Germany against XC for an offence committed in Portugal. Since XC was in Portugal, the German authorities issued an EAW in order to prosecute XC for that offence. The Portuguese executing authority authorised XC's surrender to the German judicial authorities. XC received a custodial sentence of 1 year and 3 months. During the execution of that sentence, the suspension on probation of the sentence imposed in 2011 was revoked. Therefore, on 22 August 2018, the German authorities asked the Portuguese executing authority to renounce the application of the speciality rule and consent to the execution of the sentence imposed in 2011. In the absence of any response from the Portuguese executing judicial authority, XC was released. In 2018, he went to the Netherlands and later to Italy. The next day, the German authorities issued a new EAW against XC for the purposes of executing the first judgment of 2011. XC was arrested in Italy in execution of that EAW and surrendered to Germany. Third, in 2018, a new arrest warrant was issued in Germany for the purposes of the conduct of a criminal investigation into a third case involving XC relating to an offence committed in Portugal in 2005. Therefore, the German authorities asked the Italian executing authority also to give consent for XC to be prosecuted for that offence. That authority granted the request and XC was remanded in custody in Germany pursuant to the national arrest warrant. During that period, by judgment of 2019, XC was convicted in the third case for the offence committed in Portugal in 2005 and he received a combined custodial sentence of 7 years, taking into account the judgment of 2011. XC brought an appeal on a point of law against that judgment before the referring court, relying on the speciality rule laid down in Article 27 EAW FD. He claims, in essence, that, in so far as the Portuguese executing judicial authority did not consent to his prosecution for the offence committed in Portugal, the German authorities were not entitled to prosecute him. In view of that argument, the referring court is uncertain whether the arrest warrant of 5 November 2018 can be maintained or must be annulled.

- ***Main question.*** Does the rule of speciality under Article 27(2) and (3) EAW FD allow the adoption of a measure involving a deprivation of liberty against a person subject to a first EAW on the basis of an offence different to that which constituted the basis for his or her surrender under that EAW and prior to that offence, when that person's departure from the Member State which issued the first EAW was voluntary and he or she was surrendered to that Member State under a second EAW issued after that departure for the purposes of executing a custodial sentence, provided that, under the second EAW, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty?
- ***CJEU's reply.*** **Article 27(2) and (3) EAW FD must be interpreted as meaning that the rule of speciality does not preclude a measure involving a deprivation of liberty taken against a person subject to a first EAW on the basis of an offence different to that which constituted the basis for his or her surrender under that EAW and prior to that offence, when that person's departure from the Member State which issued the first EAW was voluntary and he or she was surrendered to that Member State under a second EAW issued after that departure for the purposes of executing a custodial sentence, provided that, under the second EAW, the judicial authority executing that warrant consented to the extension of the prosecution to the offence which gave rise to that measure involving deprivation of liberty.** The CJEU's main arguments follow.
  - **The speciality rule is closely connected to the surrender resulting from the execution of a specific EAW.**
    - Articles 27 and 28 EAW FD lay down rules derogating from the principle of mutual recognition and cannot be interpreted in a way which would frustrate the objective pursued by that FD, which is to facilitate and accelerate surrenders between the judicial authorities of the Member States (para 35, with a reference to *Melvin West*);

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

Joined cases C-428/21 PPU and C-429/21 PPU, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, Judgment of 26 October 2021.

- See also *infra* 12.3 (on subsequent surrender).
- ***Facts.*** In 2020, a Dutch court executed a Hungarian EAW and surrendered HM, a third-country national, to Hungary for prosecution for money laundering. In 2021, a Hungarian judicial authority requested on the basis of Article 27(3)(g) and (4) EAW FD authorisation from the Dutch court to prosecute HM also for offences different from those for which he had been surrendered. The Dutch court observed that the EAW FD contains no rules on the procedure to be followed by the executing judicial authority when requested to give consent under Article 27 EAW FD. Considering that the requested person is in detention in the issuing Member State, the referring court wondered how the requested person's right to be heard could be ensured and referred questions to the CJEU for a preliminary ruling.
- ***Main questions.*** Where must the surrendered person be able to exercise his right to be heard in relation to a request for an extension of the offences? In the issuing Member State when a judicial authority of that Member State grants him a hearing relating to the possible renunciation of the entitlement to the speciality rule? Or in the Member State which previously surrendered him in the proceedings relating to the request for consent to extend the offences and, if that is the case, in what way must that Member State enable him to do so?
- ***The CJEU's reply.*** **Article 27(3)(g) and (4) EAW FD, read in the light of the right to effective judicial protection as guaranteed by Article 47 Charter, must be interpreted as meaning that a person who has been surrendered to the issuing judicial authority for the purpose of executing an EAW has the right to be heard by the executing judicial authority, where that authority is requested by the issuing judicial authority to give its consent under Article 27 EAW FD. This hearing can take place in the issuing Member State, in which case the issuing judicial authorities must ensure that the surrendered person's right to be heard is exercised effectively, without the executing judicial authority participating directly. However, it is for the executing judicial authority to ensure that it**

has sufficient information, in particular as regards the position of the person concerned, to be able to take its decision, in full knowledge of the facts and in full respect of the rights of the defence of the person concerned, on the request for consent and, where appropriate, to request additional information from the issuing judicial authority as a matter of urgency. The CJEU's main arguments follow.

- Article 27 EAW FD lays down rules derogating from the principle of mutual recognition and cannot be interpreted in such a way as to lead to an erosion of the objective pursued by the EAW FD, which is to facilitate the surrender between judicial authorities of the Member States (paras 42–43, with references to *Generalbundesanwalt beim Bundesgerichtshof (Specialiteitsbeginsel)* and *X (Europees aanhoudingsbevel – Ne bis in idem)*).
- The duty of sincere cooperation (Article 4(3) TEU) must govern the dialogue between the executing and issuing judicial authorities (para 44, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*).
- The surrendered person has a right to be heard in the context of Article 27(3)(g) and (4) EAW FD proceedings.
  - The EAW FD is silent on this point (para 46).
  - The EAW FD respects the fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter (para 47).
  - The right to be heard forms part of the right of the defence which are inherent in the right to effective judicial protection (para 48).
  - The decision to grant the consent referred to in Article 27(4) EAW FD must be distinguished from the decision on the execution of an EAW and has different consequences for the person concerned, yet the decision to consent may nevertheless also affect the liberty of the person concerned and thus adversely affect him (paras 49–52, with reference to *Openbaar Ministerie (Faux en écritures)*).
- The surrendered person must be heard by the executing judicial authority (paras 53–56).
- The means by which the right to be heard may be exercised.
  - The EAW FD is silent on this point (para 59), so this matter falls within the procedural autonomy of the Member States (para 60), and issuing and executing authorities can make mutual arrangements in this regard (para 61).
  - The 'right to be heard' must be read in light of Article 47(2) Charter and the case-law of the ECtHR, which holds that Article 6 ECHR does not apply to extradition proceedings (paras 64–65).
  - The executing judicial authority needs to decide on the request for consent within 30 days (para 66).
  - The 'right to be heard' requires that the surrendered person can effectively give his views to the executing authority, including any comments or objections he may have on the requested consent, but it does not imply a right to personally appear before the executing authority (para 63). The right to be heard by the executing judicial authority may be exercised in the issuing Member State, in which the person surrendered is present, without the executing judicial authority participating directly (para 67). The surrendered person can communicate his views on the possible extension of the prosecution to offences other than those which justified his surrender, for example where that authority hears him about a possible waiver of the speciality principle in accordance with Article 27(3)(f) EAW FD. If that position is recorded in a report and is subsequently communicated by the issuing judicial authority to the executing judicial authority, it must, in principle, be regarded by the executing judicial

authority as having been obtained by the issuing judicial authority in accordance with the requirements of Article 47(2) Charter (paras 68–69).

- The executing judicial authority must examine the request for consent under Article 27(4) EAW FD on the basis of the information contained in that request, taking due account of the position of the person concerned (para 70). If the information on the position of the person concerned is insufficient, the executing judicial authority must urgently request additional information in accordance with Article 15 EAW FD (para 71).

Case C-142/22, *The Minister for Justice and Equality (Demande de consentement – Effets du mandat d'arrêt européen initial)*, Judgment of 6 July 2023.

- ***Facts.*** In 2017, the Irish High Court granted the surrender of OE, the requested person, to the Netherlands based on three EAWs for prosecution that had been issued by Dutch public prosecutors, whilst rejecting all the objections raised by OE. None of his objections related to the fact that the EAWs had been issued by public prosecutors. After the surrender, he was sentenced to 18 years' imprisonment, a sentence which he is serving in the Netherlands. In 2019, a Dutch investigating judge submitted to the High Court a request for consent under Article 27(3)(g) and (4) EAW FD, seeking permission for OE to be prosecuted for offences committed prior to his surrender other than those which provided the justification for the initial EAWs. OE opposed that request, claiming that the initial EAWs had not been validly issued since they had been issued by prosecutors, that is to say by authorities which could not be regarded as 'judicial authorities' within the meaning of the EAW FD. According to OE, that fact precluded the request for consent from being granted.
- ***Main question.*** Does the fact that an EAW, on the basis of which a person was surrendered, has been issued by an authority which did not constitute an 'issuing judicial authority' within the meaning of Article 6(1) EAW FD, preclude the executing judicial authority from subsequently giving its consent to that person being prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered, when requested by an issuing judicial authority within the meaning of Article 6(1) EAW FD?
- ***CJEU's reply.*** **Article 27(3)(g) and (4) EAW FD must be interpreted as meaning that the fact that an EAW on the basis of which a person has been the subject of a surrender decision has been issued by an authority which did not constitute an 'issuing judicial authority' within the meaning of Article 6(1) does not preclude the executing judicial authority, to which a request to that effect has been made by an issuing judicial authority within the meaning of Article 6(1), from subsequently giving its consent to that person being prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.** The CJEU's main arguments follow.
  - It follows from that case-law that EAWs which have been issued by the public prosecutor of a Member State which may, in exercising its decision-making power, receive an instruction in a specific case from the executive are not issued in accordance with the EAW FD (paras 33–34, with reference to *Openbaar Ministerie (Forgery of documents)*).
  - The principle of *res judicata* is an important principle for the EU legal order and for the national legal systems. It implies that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided to exercise those rights can no longer be called into question (para 35).
  - After the surrender, the EAW has, in principle, exhausted its legal effects, with the exceptions of those laid down in Article 27 EAW FD.
    - The speciality rule (Article 27(2) EAW FD) implies that the issuing Member State, which wishes to prosecute or sentence a person for an offence committed before he

or she was surrendered under an EAW other than that for which he or she was surrendered, must obtain the consent of the executing Member State. Only where consent is given, the judicial authorities of the issuing Member State are authorised to prosecute or sentence that person for that other offence (paras 39–41, with reference to *Generalbundesanwalt beim Bundesgerichtshof (Speciality rule)* and *Openbaar Ministerie (Forgery of documents)*).

- The decision to grant the consent (Article 27(4) EAW FD) is distinct from that relating to the execution of an EAW and requires a separate and independent examination (para 42).
  - The executing judicial authority must verify whether:
    - the request for consent submitted to it is accompanied by the information referred to in Article 8(1) EAW FD and a translation;
    - the offence for which consent is requested is itself subject to the surrender obligation;
    - the extension of the prosecution to the other offences may be authorised in the light of the non-execution grounds (Articles 3 and 4 EAW FD).
  - The executing judicial authority should not review the conditions under which the surrender was carried out, particularly in light of:
    - the wording of the EAW FD (para 45);
    - the objectives to facilitate and accelerate surrender and the objective of combating impunity (paras 47, 48 and 51, with reference to *Puig Gordi and Others*);
    - the principles of legal certainty and *res judicata* (para 49).

12.3. Subsequent surrender

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

- ***Facts.*** Melvin West, a national and resident of the United Kingdom, was the subject of three successive EAWs. First, he had been surrendered by the judicial authorities of the United Kingdom (the first executing Member State) to Hungary pursuant to an EAW issued by the Hungarian national authorities for the purposes of conducting a criminal prosecution. Second, he was surrendered by Hungary (the second executing Member State) to Finland pursuant to an EAW issued by the Finnish judicial authorities for the purposes of execution of a custodial sentence. Third, he was subject to a surrender procedure in relation to an EAW issued by the French authorities for the purposes of execution of a custodial sentence imposed *in absentia* for crimes committed prior to the first surrender. The Supreme Court of Finland (the third executing Member State) had some doubts and referred the case to the CJEU.
- ***Main question.*** Does 'executing Member State' (Article 28(2) EAW FD) mean the Member State from which a person was originally surrendered to a second Member State on the basis of an EAW or the second Member State from which the person was surrendered to a third Member State which is now requested to surrender the person onward to a fourth Member State? Or is consent required from multiple Member States?
- ***The CJEU's reply.*** **Article 28(2) EAW FD must be interpreted as meaning that the subsequent surrender of the requested person to a Member State other than the Member State having last surrendered the person is subject to the consent only of the Member State which carried out that last surrender.** The CJEU's main arguments follow.
  - **The wording of Article 28(2) EAW FD.**
    - According to this provision, where none of the exceptions referred to in that article apply, a person who was surrendered to the issuing Member State

pursuant to an EAW may be surrendered by that state to a Member State other than the 'executing Member State' pursuant to an EAW only with the consent of that 'executing Member State' (para 50).

- Even if Article 28(2) does not explicitly envisage a situation such as that at issue in the main proceedings, in which the requested person is the subject of three requests for successive surrenders, in the scheme established by that provision, which concerns the subsequent surrender by the issuing Member State of a person already surrendered to it, the concept of 'executing Member State' refers to the Member State which executed the EAW on the basis of which the person concerned was surrendered to that issuing Member State and which confers on the latter the power to surrender that person, as executing Member State, to another Member State (para 51).
- In a case such as that in the main proceedings, the concept of 'executing Member State' refers to the execution of an EAW issued by the Finnish judicial authorities for the purposes of Mr West's surrender by Hungary to Finland and, therefore, that concept refers to the second executing Member State, that is to say, the state which carried out the last surrender of Mr West to the Member State which, as third executing Member State, is called upon in the present case to surrender that person to France pursuant to the EAW issued by the French judicial authorities (para 52).

- **The objective pursued by the EAW FD of accelerating and simplifying judicial cooperation between the Member States (paras 53–62).**
  - A request for consent sent simultaneously to all the executing Member States involved in a chain of EAWs could complicate and slow down the execution of an EAW as it might lead to multiple requests for supplementary information under Article 15 EAW FD and might increase the possibility of divergent decisions (paras 57–59).
  - Only a request for consent of the first executing Member State might be capable of achieving the objective of simplicity and rapidity pursued by the EAW FD. However, the direct and immediate nature of the relationship between the second and third executing Member States is such as to facilitate judicial cooperation between those two Member States (paras 60–61).
  - The interpretation according to which the concept of 'executing Member State' refers only to the Member State which carried out the last surrender of the person concerned reinforces the system of surrender established by the Framework Decision for the good of the area of freedom, security and justice, in accordance with the mutual confidence which must exist between the Member States. By limiting the situations in which the executing judicial authorities of the Member States involved in the successive surrenders of the same person may refuse to consent to the execution of an EAW, such an interpretation only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) EAW FD (para 62, with reference to *Wolzenburg*).

Joined cases C-428/21 PPU and C-429/21 PPU, *Openbaar Ministerie (Droit d'être entendu par l'autorité judiciaire d'exécution)*, Judgment of 26 October 2021.

- See also *supra* 12.2 (on speciality rule).
- ***Facts.*** In 2021, a Dutch court executed a Belgian EAW and surrendered TZ, a Dutch national, to Belgium for prosecution for acts classified as 'organised or armed robbery'. Subsequently, a Belgian judicial authority requested on the basis of Article 28(3) EAW FD authorisation from the

Dutch court for the onward surrender of TZ to Germany for the purpose of prosecution for other offences. The Dutch court observed that the EAW FD contains no rules on the procedure to be followed by the executing judicial authority when requested to give consent under Article 28 EAW FD. Considering that the requested person is in detention in the issuing Member State, the referring court wondered how the requested person's right to be heard could be ensured and referred questions to the CJEU for a preliminary ruling.

- ***Main questions.*** Where must the surrendered person be able to exercise his right to be heard in relation to a request for onward surrender? In the issuing Member State when a judicial authority of that Member State grants him a hearing relating to the possible renunciation of the entitlement to the speciality rule? Or in the Member State which previously surrendered him in the proceedings relating to the request for consent to extend the offences and, if that is the case, in what way must that Member State enable him to do so?
- ***The CJEU's reply.*** **Article 28(3) EAW FD, read in the light of the right to effective judicial protection as guaranteed by Article 47 Charter, must be interpreted as meaning that a person who has been surrendered to the issuing judicial authority for the purpose of executing an EAW, has the right to be heard by the executing judicial authority, where that authority is requested by the issuing judicial authority to give its consent under Article 28(3) EAW FD. This hearing can take place in the issuing Member State, in which case the issuing judicial authorities must ensure that the surrendered person's right to be heard is exercised effectively, without the executing judicial authority participating directly. However, it is for the executing judicial authority to ensure that it has sufficient information, in particular as regards the position of the person concerned, to be able to make its decision, in full knowledge of the facts and in full respect of the rights of the defence of the person concerned, on the request for consent and, where appropriate, to request additional information from the issuing judicial authority as a matter of urgency.** The CJEU's main arguments follow.
  - Article 28 EAW FD lays down rules derogating from the principle of mutual recognition and cannot be interpreted in such a way as to lead to an erosion of the objective pursued by the EAW FD, which is to facilitate the surrender between judicial authorities of the Member States (paras 42–43, with references to *Generalbundesanwalt beim Bundesgerichtshof (Specialiteitsbeginsel)* and *X (Europees aanhoudingsbevel – Ne bis in idem)*);
  - The duty of sincere cooperation (Article 4(3) TEU) must govern the dialogue between the executing and issuing judicial authorities (para 44, with reference to *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*).
  - The surrendered person has a right to be heard in the context of Article 28(3) EAW FD proceedings.
    - The EAW FD is silent on this point (para 46).
    - The EAW FD respects the fundamental rights and observes the principles recognised by Article 6 TEU and reflected in the Charter (para 47).
    - The right to be heard forms part of the right of the defence which is inherent in the right to effective judicial protection (para 48).
    - The decision to grant the consent referred to in Article 28(3) EAW FD must be distinguished from the decision on the execution of an EAW and has different consequences for the person concerned, yet the decision to consent may nevertheless also affect the liberty of the person concerned and thus adversely affect him (paras 49–52, with reference to *Openbaar Ministerie (Faux en écritures)*).
  - The surrendered person must be heard by the executing judicial authority (paras 53–56).
  - The means by which the right to be heard may be exercised.

- The EAW FD is silent on this point (para 59), so this matter falls within the procedural autonomy of the Member States (para 60) and issuing and executing authorities can make mutual arrangements in this regard (para 61).
- The 'right to be heard' must be read in light of Article 47(2) Charter and the case-law of the ECtHR, which holds that Article 6 ECHR does not apply to extradition proceedings (paras 64–65).
- The executing judicial authority needs to decide on the request for consent within 30 days (para 66).
- The 'right to be heard' requires that the surrendered person can effectively give his views to the executing authority, including any comments or objections he may have on the requested consent, but it does not imply a right to personally appear before the executing authority (para 63). The right to be heard by the executing judicial authority may be exercised in the issuing Member State, in which the person surrendered is present, without the executing judicial authority participating directly (para 67). The surrendered person can communicate his views on the possible onward surrender, for example where that authority hears him in the context of proceedings relating to the execution of an EAW issued subsequently by another Member State for the purpose of his surrender. If that position is recorded in a report and is subsequently communicated by the issuing judicial authority to the executing judicial authority, it must, in principle, be regarded by the executing judicial authority as having been obtained by the issuing judicial authority in accordance with the requirements of Article 47 (2) Charter (paras 68–69).
- The executing judicial authority must examine the request for consent under Article 28(3) EAW FD on the basis of the information contained in that request, taking due account of the position of the person concerned (para 70). If the information on the position of the person concerned is insufficient, the executing judicial authority must urgently request additional information in accordance with Article 15 EAW FD (para 71).

12.4. Appeal with suspensive effect

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

- ***Facts.*** Jeremy F, a British national, was surrendered from France to the United Kingdom for child abduction. He had declared before the French Court of Appeal that he consented to his surrender to the United Kingdom, without, however, waiving the speciality rule. Shortly afterwards, the chief prosecutor before the French Court of Appeal received a request from the judicial authorities of the United Kingdom seeking the consent of the investigation chamber of the French Court of Appeal for the prosecution of Jeremy F for acts committed in the United Kingdom before his surrender, namely sexual activity with a child under 16 years of age. By judgment of 15 January 2013, the French Court of Appeal decided to give consent to this request. Jeremy F appealed to the French Cassation Court against this judgment. The French Cassation Court referred to the French Constitutional Council a priority question of constitutionality relating to a provision of the French Code of Criminal Procedure which provides that, after a person has been surrendered to another Member State on the basis of an EAW, the investigation chamber must give its ruling within 30 days, not subject to appeal. At issue was the question whether the EAW FD permits such an absence of judicial redress against the decision of the investigation chamber. The question put to the Constitutional Council was whether, by providing that the investigation chamber was to give a ruling that was 'not subject to appeal', the French law of criminal procedure was or was not infringing the right to an effective judicial remedy and the principle of equality before the courts. The Constitutional Council considered

whether the EAW FD was to be construed as precluding the possibility of such an appeal. Against this background, the French Constitutional Council decided to stay the proceedings and to refer a question to the CJEU for a preliminary ruling.

- ***Main question.*** Must Articles 27(4) and 28(3)(c) EAW FD be interpreted as precluding Member States from providing for an appeal with suspensive effect against a decision to execute an EAW or a decision giving consent to an extension of the warrant or to an onward surrender?
- ***The CJEU's reply.*** **Articles 27(4) and 28(3)(c) EAW FD must be interpreted as not precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority which rules, within 30 days from receipt of the request, on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to the person's surrender pursuant to an EAW, other than that for which the person was surrendered, or to the surrender of the person to a Member State other than the executing Member State, pursuant to an EAW issued for an offence committed prior to the person's surrender, provided that the final decision is adopted within the time limits laid down in Article 17 EAW FD.** The CJEU's main arguments follow.
  - **Member States are permitted to provide for an appeal with suspensive effect, but they are not obliged to do so** (paras 37–55).
    - The absence of an express provision does not mean that the EAW FD prevents the Member States from providing for such an appeal or requires them to do so.
    - The EAW FD is not to have the effect of modifying the obligations of Member States as regards respect for the fundamental rights and legal principles enshrined in Article 6 TEU.
    - The entire surrender procedure between Member States is carried out under judicial supervision, including the action by a judicial authority with respect to the consent provided for in Articles 27(4) and 28(3)(c) EAW FD.
    - In the case of a decision to execute an EAW, the possibility of having a right of appeal follows implicitly but necessarily from the expression 'final decision' used in Articles 17(2), (3) and (5) EAW FD. There is no reason to suppose that such a possibility must be excluded in relation to a decision by which the judicial authority gives its consent to the extension of an arrest warrant or to an onward surrender to another Member State.
  - **If Member States provide for a right of appeal with suspensive effect, there are certain limits that they must respect** (paras 56–75).
    - As regards a decision to execute an EAW, the below applies.
      - Article 17 EAW FD sets clear time limits which an appeal with suspensive effect must respect.
      - These time limits must be interpreted as requiring the final decision on the execution of the EAW to be taken, in principle, either within 10 days from consent being given to the surrender of the requested person or, in other cases, within 60 days from the person's arrest. Only in specific cases may those periods be extended by an additional 30 days, and only in exceptional circumstances may the time limits prescribed in Article 17 EAW FD not be complied with by a Member State.
    - As regards the decisions to give consent to the extension of the warrant or to an onward surrender, the below applies.
      - Articles 27(4) and 28(3)(c) EAW FD provide that such decision shall be taken 'no later than 30 days after receipt of the request'.
      - Unlike Article 17 EAW FD, these provisions do not set time limits for the 'final decision' but relate only to the original decision and do not concern cases in which such an appeal is brought.

- It would, however, be contrary to the underlying logic of the EAW FD and to its objectives of accelerating surrender procedures if the periods for adoption of a final decision under Articles 27(4) and 28(3)(c) EAW FD were longer than those laid down in Article 17 EAW FD. Consequently, to ensure the consistent application and interpretation of the EAW FD, any appeal with suspensive effect provided for by the national legislation of a Member State against the decisions referred to in Articles 27(4) and 28(3)(c) EAW FD must, in any event, comply with the time limits laid down in Article 17 EAW FD.

13. 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*). The CJEU also confirmed that the provisions in the Withdrawal Agreement (WA) and in the TCA that deal with the transitional regime of the EAW FD are binding on Ireland (*Governor of Cloverhill Prison and Others*).

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

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

the EAW system for international extradition conventions whereas Article 32 EAW FD envisages a situation in which that system does not apply (para 59).
    - The instruments mentioned in Article 31(1) EAW FD, including the 1996 Convention, remain relevant in cases covered by a Member State's statement under Article 32 EAW FD (para 58).
  - **Article 32 EAW FD allows an executing Member State to apply the 1996 Convention even if that convention became applicable in that Member State only after 1 January 2004.**
    - The application of the 1996 Convention is consistent with the EAW system because the convention can be used only where the EAW system does not apply (para 74).
    - The application of the 1996 Convention is consistent with the objectives of the EU (para 77).
    - According to settled case-law, procedural rules – such as provisions governing the extradition of persons – are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying to situations existing before their entry into force (para 80).

Case C-479/21 PPU, *Governor of Cloverhill Prison and Others*, Judgment of 16 November 2021.

- ***Facts.*** In September 2020, SD was arrested in Ireland pursuant to an EAW issued by the United Kingdom, seeking his surrender to serve a prison sentence. SN was arrested in Ireland in February 2021, pursuant to an EAW issued by the same authorities, seeking his surrender for the purposes of conducting a criminal prosecution. SD and SN have been detained in Ireland since their arrest, pending the decision on their respective surrender. The High Court (Ireland) having found that their detention was lawful and having refused to order their release, SD and SN appealed to the Supreme Court of Ireland. According to the Supreme Court, the Irish law transposing the EAW FD may be applied in respect of a third country provided that there is an agreement in force between that country and the EU for the surrender of requested persons. However, for that legislation to apply, the agreement concerned, namely, in the present case, the Withdrawal Agreement (WA) and the TCA must be binding on Ireland. That might not be the case since those agreements contain measures – concerning respectively the EAW regime and the new surrender mechanism between the EU and the United Kingdom – falling within the Area of Freedom, Security and Justice and which are therefore, in principle, not binding on Ireland under Protocol No 21. Ireland has not made use of the possibility, offered by Protocol No 21, to opt into the provisions of those agreements relating to those measures, either when the United Kingdom withdrew from the EU or when the TCA was concluded.
- ***Main question.*** Are the provisions of the WA which provide for the continuation of the EAW regime in respect of the United Kingdom during the transition period and the provision of the TCA which provides for the application of the surrender regime established by Title VII of Part Three of the TCA to EAWs issued before the end of that transition period in respect of persons not yet arrested for the purpose of the execution of those warrants before the end of that period, binding on Ireland?
- ***CJEU's reply.*** **Article 50 TEU, Article 217 TFEU and Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, must be interpreted as meaning that Article 62(1)(b) of the WA, read in conjunction with the fourth paragraph of Article 185 thereof, and Article 632 of the TCA, are binding on Ireland.** The CJEU's main arguments follow.
  - Article 50 TEU constitutes the only appropriate legal basis for the WA making the provisions of Protocol (No 21) inapplicable.

- Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the EU and, second, establishing a procedure to enable such a withdrawal to take place in an orderly fashion (para 49);
- Article 50(2) TEU confers on the EU alone the competence to conclude an agreement setting out the arrangements for the withdrawal of a Member State from the EU. That agreement is intended to regulate, in all areas covered by the Treaties, all questions relating to the withdrawal. The EU was thus able to conclude the WA, which provides that EU law, including the EAW FD, is to apply in the United Kingdom during the transition period (paras 50–52).
- It is not possible to add to Article 50(2) TEU legal bases laying down procedures which are incompatible with the procedures laid down in that provision (para 54). To add Article 82(1)(d) TFEU to the substantive legal basis for the WA would give rise to uncertainty since, because of the resulting applicability of Protocol (No 21), Ireland, which had chosen to be bound by the EAW regime, including with regard to the United Kingdom, would be treated as if it had never participated in it. This would be difficult to reconcile with the objective of reducing uncertainty and limiting disruption so as to enable an orderly withdrawal (para 55).

- The TCA could be based solely on Article 217 TFEU without the provisions of Protocol (No 21) being applicable.
  - Article 217 TFEU empowers the EU to guarantee commitments towards third countries in the fields covered by the TFEU (para 57);
  - Agreements concluded on the basis of Article 217 TFEU may contain rules concerning all the fields falling within the competence of the EU. Given that, under Article 4(2)(j) TFEU, the EU has shared competence as regards the Area of Freedom, Security and Justice, measures falling within that area may be included in an association agreement such as the TCA (para 58).
  - There is no risk of more stringent procedural requirements being circumvented as the conclusion of an agreement such as the TCA does not relate to a single specific area of action but, on the contrary, a wide range of areas of EU competence with a view to achieving an Association between the EU and a third State, and the conclusion of such an agreement requires a unanimous vote and the consent of the European Parliament (para 62).
  - A requirement to add, in the present case, an additional specific legal basis cannot be inferred from the Court's established case-law on using multiple legal bases (paras 63–68).

14. Extradition of EU citizens to third countries

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

EU citizenship, free movement and non-discrimination. The CJEU stated that a law that provides for the non-extradition of a Member State's own nationals – while allowing the extradition of EU citizens who are nationals of another Member State – constitutes unequal treatment and gives rise to a restriction of freedom of movement within the meaning of Article 21 of the TFEU. The said restriction can be justified if it is based on a legitimate objective and if it is proportionate. The CJEU agreed that 'preventing the risk of impunity for persons who have committed an offence' is a legitimate objective in EU law. However, the CJEU also found that granting an extradition request is not the most proportionate measure to attain this aim. According to the CJEU, a more proportionate measure than extradition would be to apply all the cooperation and mutual assistance mechanisms provided for in EU criminal law and/or to explore mechanisms in national and/or international law. This interpretation of Articles 18 and 21(1) TFEU and the therein included active obligation that rests on the requested State to look for an alternative to extradition that is less prejudicial to the exercise of the rights and freedoms that EU citizens derive from Articles 18 and 21(1) TFEU apply to extradition requests for prosecution and extradition requests for the execution of a custodial sentence.

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

Extradition requests for the purpose of the execution of a custodial sentence (*Raugevicius, Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*). The principle of *ne bis in idem* may be an obstacle to apply the abovementioned mechanism in the context of extradition requests for enforcing a custodial sentence. However, there are other mechanisms under national and/or international law that make it possible for those persons to serve their

sentences, in particular in the Member State of which they are nationals, in view of increasing their chances of social rehabilitation, for example the 1983 Convention on the Transfer of Sentenced Persons. Moreover, if the requested person resides permanently in the requested State's territory, the requested Member State should explore the possibility that the requested person serve the sentence pronounced abroad on its territory (*Raugevicius; Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*). The obligation of the requested Member State to actively seek to ascertain whether there is a less prejudicial alternative to extradition for the execution of a custodial sentence available implies to actively seek, if applicable, the consent of the third State. If the third State does not consent to a custodial sentence being served in the requested State, extradition to the third State may be justified to prevent the risk of impunity *(Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*).

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

Human rights assessment. The CJEU held that, where a Member State receives a request from a third State seeking the extradition of a national of another Member State, that first Member State must verify that the extradition will not prejudice the rights referred to in Article 19 Charter (*Petruhhin, Raugevicius, Ruska Federacija; (Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*). In relation to an extradition request seeking the extradition of a national of a European Free Trade Association (EFTA) the CJEU held that the granting of asylum is a particularly substantial piece of evidence in the context of that verification, particularly if that grant was based precisely on the criminal proceedings that were the basis of the extradition request *(Ruska Federacija).* [15] In line with the *Aranyosi and Căldăraru* judgment, the CJEU also recalled that the requested Member State must base its assessment on information that is objective, reliable, specific and properly updated.

[15] More broadly, in relation to the impact of asylum decision for extradition cases related to third country nationals (not being EU or EFTA nationals), see CJEU, Judgment of 18 June 2024 in Case C-352/22, *A. v. Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie)*, available here. In this judgment, the CJEU held that where a third country national who has been granted refugee status in one Member State is the subject, in another Member State, on whose territory he or she resides, of an extradition request from his or her country of origin, the requested Member State cannot authorise extradition unless it has initiated an exchange of information with the authority that granted the requested individual refugee status and where that status has not been revoked by that authority.

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

- ***Facts.*** Russian authorities had issued a request to the Latvian authorities for the extradition of Petruhhin in connection with a drug-trafficking offence. Petruhhin, an Estonian national, had made use of his right to move freely within the EU. Under Latvian law, Latvian citizens are protected against extradition. Petruhhin claimed that – as an EU citizen – he should enjoy the same rights in Latvia as a Latvian national. The Latvian court halted proceedings and referred to the CJEU for the interpretation of Articles 18 and 21(1) TFEU (non-discrimination and EU citizenship) and Article 19 Charter (protection in the event of removal, expulsion or extradition).
- ***Main questions.*** Must, under Article 18(1) TFEU and Article 21(1) TFEU, an EU citizen enjoy the same level of protection as a national of the Member State in question in the event of an extradition request from a third State to an EU Member State regarding a citizen of another EU Member State? Is, under Article 19 Charter, a Member State that decided to extradite an EU citizen to a third State required to verify that the extradition will not prejudice the rights provided for in Article 19 Charter?
- ***The CJEU's reply.*** **Articles 18 and 21 TFEU must be interpreted as meaning that, when a Member State to which an EU citizen, a national of another Member State, has moved receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it must inform the Member State of which the citizen in question is a national and, should that Member State so request, surrender that citizen to it, in accordance with the EAW FD, provided that that Member State has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory. Where a Member State receives a request from a third State seeking the extradition of a national of another Member State, it must verify that the extradition will not prejudice the rights referred to in Article 19 Charter.** The CJEU's main arguments follow.
  - **Duty to exchange information with the Member State of origin and priority of a potential EAW over the extradition request.**
    - The unequal treatment which allows the extradition of an EU citizen who is a national of another Member State gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (para 33).
    - Such a restriction can be justified if it based on objective considerations and proportionate to the legitimate objective of the national provision.
      - Legitimate objective (para 37). Preventing the risk of impunity for persons who have committed an offence.
      - Proportionality (paras 38–49). In the absence of EU rules that govern extradition between the EU and the third State involved, the requested Member State must exchange information with the Member State of origin and must give priority to a potential EAW over the extradition request.
  - **Impact of the Charter.**
    - The prohibition of inhuman or degrading treatment or punishment included in Article 4 Charter is absolute (para 56).
    - The existence of declarations and accession to international treaties are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR (para 57).
    - If the competent authority of the requested Member State is in possession of evidence of a real risk of inhuman or degrading treatment of individuals in the requesting third State and it is called on to decide on the extradition of a person

to that state, it is bound to assess the existence of that risk (para 58, with reference to *Aranyosi and Căldăraru*).

- For the purpose of this assessment, the competent authority of the requested Member State must rely on information that is objective, reliable, specific and properly updated (para 59).

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

- ***Facts.*** Pisciotti, an Italian national, had been under investigation in the United States since 2007 for his participation in anti-competitive concerted practices and agreements. In 2010, an EAW was issued against him by a US court. In 2013, Pisciotti was arrested in Germany when his flight from Nigeria to Italy made a stopover at a German airport. Pisciotti was provisionally detained pending extradition and, in 2014, the extradition was approved by a German court. Pisciotti pleaded guilty in the criminal proceedings brought against him and served his prison sentence in the United States. Before his extradition, Pisciotti had brought an action before a German court for a declaration that Germany was liable for having granted his extradition. The referring court halted proceedings and referred to the CJEU for the interpretation of Article 18 TFEU.
- ***Main question.*** Is Article 18(1) TFEU and the case-law of the CJEU relating to that provision to be interpreted as meaning that a Member State unjustifiably breaches the prohibition of discrimination under Article 18(1) TFEU in the case where, on the basis of a rule of constitutional law (the first sentence of Article 16(2) of the German Basic Law), it treats, in the matter of requests for extradition received from third 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 an EU citizen who has been the subject of a request for extradition to the United States under the Agreement on extradition between the EU and the Unites States (EU–US Agreement) has been arrested in a Member State other than the Member State of which they are a national, Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its nationals and the nationals of other Member States and from granting that extradition while not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to an EAW and the latter Member State has not taken any action in that regard.** The CJEU's main arguments follow.
  - Unequal treatment which allows the extradition of an EU citizen who is a national of a Member State other than the requested Member State gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (para 45, with reference to *Petruhhin*).
  - Such a restriction must be proportionate to the legitimate objective pursued and necessary for the protection of the interests and cannot be attained by less restrictive measures. The objective of preventing the risk of impunity for persons who have committed an offence must be considered as a legitimate objective (paras 46–48, with reference to *Runevič-Vardyn and Wardyn* and *Petruhhin*). The exchange of information with the Member State of which the person concerned is a national must be given priority, where relevant, to afford the authorities of that Member State the opportunity to issue an EAW for the purposes of prosecution. This cooperation mechanism does not only apply in a context characterised by the absence of an international agreement on extradition but also in a situation in which the EU–US Agreement gives the requested Member State the option of not extraditing its own nationals (paras 51 and 52, with reference to *Petruhhin*).

- The cooperation mechanism does not necessarily preclude a request for extradition to a third State by giving priority to an EAW, as the EAW must, at least, relate to the same offences and the issuing Member State must have jurisdiction, pursuant to national law, to prosecute that person for such offences, even if committed outside its territory (para 54, with reference to *Petruhhin*).

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

- ***Facts.*** Raugevicius is a Lithuanian national who has moved to Finland and has lived there for several years. He is also father to two children residing in Finland and having Finnish nationality. In 2011, Russian authorities convicted him and issued an international arrest warrant for the execution of a custodial sentence. In order to decide on the request for extradition, the Finnish Ministry of Justice asked for an opinion of the Supreme Court of Finland. The Supreme Court notes that, although, in principle, there is an obligation on the requested Member State to proceed against its own nationals, in the situation where it does not extradite them, there is no corresponding obligation to make them serve, on its territory, the sentence imposed on them by a third State. The Supreme Court recalls the *Petruhhin* judgment, but notes that there are differences between the present case (extradition request for serving a custodial sentence), and the case giving rise to the *Petruhhin* judgment (extradition request for the purpose of prosecution). The Supreme Court was uncertain as to whether it should apply an alternative to extradition that is less prejudicial to the exercise of the right to free movement. Therefore, it referred a request for preliminary ruling to the CJEU.
- ***Main questions.*** Are national provisions on extradition to be assessed with respect to the freedom of movement of nationals of another Member State in the same way, regardless of whether the extradition request of a third State, on the basis of an extradition convention, concerns the enforcement of a custodial sentence or a prosecution as in *Petruhhin*? How is a request for extradition to be answered in a situation in which, the request is notified to another Member State, which, however, does not, because of legal obstacles, for instance, adopt measures concerning its nationals? Is it relevant that the requested person, as well as being a citizen of the Union, is a national of the requesting third State?
- ***CJEU's reply.*** **Articles 18 and 21 TFEU must be interpreted as meaning that, where an extradition request has been made by a third State for an EU citizen who has exercised his right to free movement, not for the purpose of prosecution, but for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the EU for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition.** The CJEU's main arguments follow.
  - **Application, by analogy, of the CJEU's *Petruhhin* ruling.**
    - An EU citizen, such as Mr Raugevicius, a national of a Member State (Lithuania), who moved to another Member State (Finland), made use of his right to move freely, so that his situation falls within the scope of Article 18 TFEU, which lays down the principle of non-discrimination on grounds of nationality (para 27, with reference to *Petruhhin*).
    - Holding dual nationality of a Member State and a third State cannot deprive the person concerned of the freedoms he derives from EU law as a national of a Member State (para 29).
    - A national rule which prohibits only Finnish nationals from being extradited introduces a difference in treatment between those nationals and nationals of other

Member States and gives rise to a restriction of freedom of movement within the meaning of Article 21 TFEU (paras 28 and 30, with reference to *Petruhhin*).
- Such a restriction must be proportionate to the legitimate objective pursued (preventing the risk of impunity) and necessary for the protection of the interests and cannot be attained by less restrictive measures (paras 31 and 32, with reference to *Petruhhin*).

- **The 'less restrictive measure' depends on the type of extradition request involved.**
  - In relation to extradition request for the purposes of a prosecution, the non-extradition of a Member State's own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals (para 33, with reference to *Petruhhin*).
  - In relation to extradition requests for the purpose of the execution of a custodial sentence, Member States could not prosecute again the same person for the same facts, as this would violate the principle of *ne bis in idem* (para 36). In order to prevent the risk of such persons remaining unpunished, there are mechanisms under national law and/or international law which make it possible for those persons to serve their sentences, in particular, in the State of which they are nationals and, in doing so, increase their chances of social reintegration after they have completed their sentences (para 36). This is, for instance, the case with the Convention on the Transfer of Sentenced Persons, in which Russia participates as well (para 37). In addition, Finnish legislation provides that its own nationals can serve a sentence pronounced in another State in its territory (para 38).
- **The 'less restrictive measure' in the case of a requested person who is a long-term resident in the requested Member State.**
  - The Finnish nationals, on the one hand, and, on the other, nationals of other Member States who reside permanently in Finland and demonstrate a certain degree of integration are in a comparable situation (para 46).
  - It is for the referring court to establish whether the requested person falls within that category of nationals of other Member States (para 46).
    - If the court finds that Raugevicius is a permanent resident in Finland, Articles 18 and 21 TFEU require that he should benefit from the provision preventing extradition from being applied to Finnish nationals and may, under the same conditions as Finnish nationals, serve his sentences on Finnish territory (para 470).
    - If the court finds that Raugevicius may not be regarded as residing permanently in the requested Member State, the issue of his extradition is to be settled on the basis of the applicable national or international law (para 48).
- **Impact of the Charter.** In the event that the requested Member State intends to extradite a national from another Member State at the request of a third State, the first Member State must check that the extradition will not infringe the rights guaranteed by the Charter, in particular Article 19 (para 49, with reference to *Petruhhin*).

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

- ***Facts.*** On 20 May 2015, I.N., a Russian national, was the subject of an international wanted persons notice published by Interpol's bureau in Moscow. On 30 June 2019, I.N., who in the meantime had acquired Icelandic nationality, was arrested in Croatia, where he was on holiday, based on that notice. On 6 August 2019, the Croatian authorities received an extradition request from Russia. Croatian law prohibits the extradition of Croatian nationals, but not the extradition of non-nationals. The Croatian court responsible for ruling on the extradition considered that

the legal conditions for extradition were satisfied and permitted it. I.N. lodged an appeal to the Supreme Court of Croatia, challenging that decision. The Supreme Court of Croatia referred the case to the CJEU to know whether the *Petruhhin* case-law also applied in a situation concerning a person who was not an EU citizen, but an Iceland citizen, Iceland being a State of the European Free Trade Association (EFTA) which is party to the Agreement on the European Economic Area (EEA Agreement).

- ***Main questions.*** Does Article 18 TFEU mean that an EU Member State, which gives a ruling on the extradition to a third State of a national of a Member State of the Schengen area (Schengen State), should inform that Schengen State, which granted nationality to the requested person? If the answer to the preceding question is in the affirmative and the Schengen State has requested the surrender of that person in order to conduct the proceedings in respect of the extradition request, must the EU Member State surrender that person to that Schengen State, in accordance with the Agreement on the surrender procedure?
- ***CJEU's reply.*** **When a Member State must rule on an extradition request by a third State, concerning a national of a State of the EFTA, which is a party to the EEA Agreement, it must verify that that extradition would not infringe the rights covered by Article 19(2) Charter. Before proposing to execute the request for extradition, the Member State must inform the EFTA State of the request, to enable that state to seek the surrender of its national if that EFTA State has jurisdiction, pursuant to its national law, to prosecute that national for offences committed outside its national territory.** The CJEU's main arguments follow.
  - **The situation of an Icelandic national falls within the scope of EU law.**
    - Articles 18 and 21 TFEU do not apply to a national of a third State (paras 40 and 41);
    - The EEA Agreement is an integral part of EU law and is applicable (paras 49–54): Article 36 of the EEA Agreement guarantees the freedom to provide services, in a manner that is identical, in essence to Article 56 TFEU and includes the right to travel to another State to receive services there. In the present case I.N. went to Croatia to spend his holidays and thus to receive services related to tourism.
  - **Impact of the Charter.**
    - If the requested person invokes a real risk of inhuman or degrading treatment if extradited, the requested Member State must verify, before carrying out the extradition, that it would not prejudice the rights laid down in Article 19(2) Charter (para 64, with reference to *Petruhhin*).
    - The competent authority of the requested Member State must not restrict itself to taking into consideration solely the declarations of the requesting third State or the accession, by the latter State to international treaties guaranteeing, in principle, respect for fundamental rights. It must rely, for the purposes of that verification, on information that is objective, reliable, specific and properly updated (para 65, with reference to *Petruhhin*).
    - The granting of asylum is a particularly substantial piece of evidence in the context of that verification, particularly since that grant was based precisely on the criminal proceedings that were the basis of the extradition request (paras 66 and 67).
  - **Application, by analogy, of the CJEU's *Petruhhin* ruling.**
    - National rules, which do not grant EFTA nationals the protection against extradition enjoyed by nationals of the Member State in question, constitute an unequal treatment, which gives rise to a restriction of freedom of movement (paras 56 and 57, with reference to *Petruhhin*).

- Such a restriction can be justified if it based on objective considerations and proportionate to the legitimate objective of the national provision (para 59, with reference to *Petruhhin*).
  - Legitimate objective: preventing the risk of impunity for persons who have committed an offence (paras 60–62, with reference to *Petruhhin*).
  - Proportionality: the use of the cooperation and mutual assistance mechanisms provided for in the criminal field under EU law is an alternative means, which is less prejudicial to the exercise of the right to freedom of movement (para 69, with reference to *Petruhhin*).
  - Although the EAW FD does not apply to the Republic of Iceland, that State, like Norway, has concluded with the EU the Agreement on the surrender procedure and the provisions of that Agreement are very similar to the corresponding provisions of the EAW FD (paras 71–74).
  - When a Member State, to which a national of the Republic of Iceland has moved, receives an extradition request from a third State with which the first Member State has concluded an extradition agreement, it is in principle obliged to inform the Republic of Iceland. Should that State so request, the Member State should surrender that national to it, in accordance with the provisions of the Agreement on the surrender procedure, if the Republic of Iceland has jurisdiction, pursuant to its national law, to prosecute that person for offences committed outside its national territory (para 76).

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

- ***Facts.*** BY, who is a national of both Ukraine and Romania, was born in Ukraine and lived in that State until he moved to Germany in 2012. In 2014, he applied for and obtained Romanian nationality as a descendant of Romanian nationals, but he has never resided in Romania. In March 2016, the German authorities received from Ukraine a request for the extradition of BY for conducting a criminal prosecution. In November 2016, the German authorities informed the Romanian Ministry of Justice of the extradition request and asked whether the Romanian authorities envisaged a criminal prosecution of BY. The Romanian Ministry of Justice replied that (i) the Romanian authorities could make a decision to conduct a criminal prosecution only if requested to do so by the Ukrainian judicial authorities and (ii) the issue of an arrest warrant, was subject to there being sufficient evidence of the guilt of the person concerned. That ministry therefore asked the German authorities to provide it with the evidence from the Ukrainian authorities. German law prohibits the extradition of German nationals, but not the extradition of nationals of other Member States. The German court considered that the extradition of BY to Ukraine is lawful, but it is uncertain whether that extradition is not incompatible with the principles set out by the CJEU in the *Petruhhin* judgment, given that the Romanian judicial authorities have not formally made a decision on the possible issue of an EAW. The German court submitted to the CJEU three questions for a preliminary ruling, concerning the interpretation of Articles 18 and 21 TFEU and of the *Petruhhin* judgment.
- ***Main questions.*** Do the principles in the *Petruhhin* judgment also apply if the individual sought moved his or her centre of interests to the requested Member State at a time when he or she was not yet an EU citizen? Is the home Member State that has been informed of an extradition request obliged, based on the *Petruhhin* judgment, to request that the case files be sent to it by the requesting third State for assessing the possibility of itself undertaking a prosecution? Is a Member State that has been requested by a third State to extradite an EU citizen obliged, based on the *Petruhhin* judgment, to refuse extradition and to undertake a criminal prosecution itself, if it is possible for it to do so under its national law?

- ***CJEU's reply.*** **Articles 18 and 21 TFEU apply to the situation of a citizen of the EU, who is a national of one Member State, residing in the territory of another Member State even where that citizen moved the centre of his or her interests to that other Member State at a time when he or she did not have EU citizenship. The Member State that received an extradition request may extradite the EU citizen to a third State only after consultation with the Member State of which that citizen is a national. As part of that consultation, the requested Member State must inform the Member State of nationality of all the elements of fact and law communicated in the extradition request. Neither of those Member States is obliged to ask the third State requesting extradition to send to them a copy of the criminal investigation file. The requested Member State is not obliged to wait for the Member State of which that person is a national to waive by a formal decision the issue of such an arrest warrant, but it must give the latter a reasonable time to issue an EAW. Such an arrest warrant must concern, at least, the same offences as those referred to in the extradition request. The requested Member State is not obliged to refuse extradition and itself to conduct a criminal prosecution where its national law permits it to do so.** The CJEU's main arguments follow.
  - **Applicability of Articles 18 and 21 TFEU to a person who acquired nationality of an EU Member State at a time when he was already residing in another Member State and/or has dual nationality.**
    - A national of a Member State, who thereby has EU citizenship, and who is lawfully resident in the territory of another Member State, falls within the scope of EU law (para 29).
    - By virtue of having EU citizenship, a national of a Member State residing in another Member State is entitled to rely on Article 21(1) TFEU and falls within the scope of the Treaties, within the meaning of Article 18 TFEU, which sets out the principle of non-discrimination on grounds of nationality (para 30, with reference to *Petruhhin*).
    - The fact that that EU citizen acquired the nationality of a Member State and, therefore, EU citizenship, only at a time when he or she was already residing in a Member State other than that of which he or she subsequently became a national is not capable of invalidating that consideration (para 31).
    - The same can be said of the fact that the EU citizen whose extradition is requested also holds the nationality of the third State, which made that request. Holding dual nationality of a Member State and a third State cannot deprive the person concerned of the freedoms he or she derives from EU law as a national of a Member State (para 32).
  - **Conformation of the consultation mechanism as referred to in the *Petruhhin* judgment.**
    - The requested State has an obligation to inform the Member State of nationality so that that Member State is in a position to request the surrender (para 43, with reference to *Petruhhin* and para 47, with reference to *Pisciotti*).
    - The exchange of information gives the authorities of the Member State of nationality the opportunity to issue an EAW for the purpose of prosecution (para 43, with reference to *Petruhhin*).
      - If the Member State of nationality issues an EAW, the requested State must surrender the person, in accordance with the provisions of the EAW FD, if the latter Member State has jurisdiction, under its national law, to prosecute the requested person for offences committed outside its national territory. The EAW must relate, at least, to the same offences as those of which that person is accused in the extradition request (paras 43 and 44, with reference to *Petruhhin* and *Pisciotti*).

- If the Member State of nationality does not issue an EAW, the requested Member State may carry out the extradition, provided that it has verified, as required by the Court's case-law, that that extradition will not prejudice the rights referred to in Article 19 Charter (para 45, with reference to *Petruhhin*).

- **Further clarification regarding the obligations surrounding the information exchange.**
  - **Informing of extradition request and all matters of fact and law.** The requested Member State must inform the competent authorities of the Member State of nationality not only of the existence of the extradition request, but also of all the matters of fact and law communicated by the third State requesting extradition in the context of that extradition request (para 48).
  - **Confidentiality.** The requested State is bound to respect the confidentiality of such matters where confidentiality has been sought by that third State (para 48).
  - **Keeping third State informed.** The requested Member State must keep the third State informed of any changes in the situation of the requested person that might be relevant to the possibility of an EAW being issued with respect to that person (para 48).
  - **No obligation to transmit the criminal file.** Neither the requested Member State nor the Member State of nationality can be obliged, under EU law, to make an application to the third State that is requesting extradition for the transmission of the criminal investigation file (para 49). Any decision by the Member State of nationality to ask the third State to send the criminal investigation file, to permit an assessment of the appropriateness of any prosecution, is a matter that is within the discretion of that Member State (para 52).
  - **Reasonable time limit.** It is for the requested Member State to set for the Member State of nationality a reasonable time limit. Such a time limit must take account of all the circumstances of the case, including whether that person may be in custody based on the extradition procedure and the complexity of the case. The requested Member State may carry out the extradition without being obliged to wait, for longer than such a reasonable time, for the Member State of nationality to adopt a formal decision (paras 54 and 55).

- **No obligation under EU law for the requested State to prosecute the person for the offences committed in a third State where the national law of the requested Member State permits it to do so.**
  - If there were an obligation on the requested Member State to refuse extradition and to prosecute, the consequence would be that that Member State would not have the opportunity to decide itself on the appropriateness of conducting a prosecution of that citizen based on national law, in the light of all the circumstances of the particular case, including available evidence. Such an obligation would go beyond the limits that EU law may impose on the exercise of the discretion enjoyed by that Member State with respect to whether or not prosecution is appropriate in an area such as criminal law. Criminal law falls, in accordance with the Court's settled case-law, within the competence of the Member States, even though they must exercise that competence with due regard for EU law (para 65).

Case C-237/21, *Generalstaatsanwaltschaft München (Demande d'extradition vers la Bosnie-Herzégovine)*, Judgment of 22 December 2022.

- ***Facts.*** Bosnia and Herzegovina requested Germany to extradite a Bosnian national, who also held Croatian nationality and is thus an EU citizen, for the purpose of enforcing a six-month custodial sentence for corruption. The German authorities informed the Croatian authorities of the extradition request, but received no response. According to the competent German court, Germany is, in principle, obliged to extradite the requested person under the European Convention on Extradition (Convention). Unlike the case which gave rise to *Raugevicius*, any refusal by Germany to extradite the person to Bosnia and Herzegovina would be contrary to the obligations of Germany under that Convention. The term 'national' (Article 6(1)(b) Convention) refers according to the German declaration only to persons holding the German nationality. However, according to German law, the requested person could serve his sentence in Germany if Bosnia and Hersegovina consented to that. Being uncertain as to the application of the relevant case-law of the CJEU, particularly when there is an extradition obligation under international law, the German court referred a question to the CJEU.
- ***Main question.*** Do the principles governing the application of Articles 18 and 21 TFEU established by the Court in *Raugevicius* require that a request from a third State seeking the extradition of an EU citizen for the purpose of enforcing a sentence is to be refused, even where the requested Member State is obliged by international law under the European Convention on Extradition to extradite the EU citizen, because it has defined the term 'nationals' within the meaning of Article 6(1)(b) of that Convention as meaning that it refers only to its own nationals, not to other EU citizens?
- ***CJEU's reply.*** **Articles 18 and 21 TFEU must be interpreted as follows. First, a Member State to which a request for extradition has been made by a third State for the purpose of enforcing a custodial sentence imposed on a national of another Member State residing permanently in the first Member State, the national law of which prohibits only the extradition of its own nationals out of the EU and makes provision for the possibility that that sentence may be enforced in its territory provided that the third State consents to it, is required by those provisions actively to seek such consent from the third State which made the extradition request, by using all the mechanisms for cooperation and assistance in criminal matters which are available to it in the context of its relations with that third State. Second, if such consent is not obtained, that first Member State is not precluded by those provisions, in such circumstances, from extraditing that EU citizen, in accordance with its obligations under an international convention, in so far as that extradition does not infringe the rights guaranteed by the Charter.** The CJEU's main arguments follow.
  - **The requested person, who is a national of an EU Member State and lawfully resident in another Member State, is entitled to rely on Article 21(1) TFEU and falls within the scope of the Treaties within the meaning of Article 18 TFEU.**
    - In the absence of EU legal provisions on the extradition of nationals of Member States to third States, Member States have the power to adopt such provisions. However, those Member States are required to exercise that power in accordance with EU law, in particular the prohibition on discrimination laid down in Article 18 TFEU and the right to move and reside freely within the territory of the Member States guaranteed by Article 21(1) TFEU (para 29, with reference to *Raugevicius*).
    - The fact that a national of a Union Member State also holds the nationality of the third State which made that request cannot prevent that national from asserting the rights and freedoms conferred by EU citizenship, in particular those guaranteed by Articles 18 and 21 TFEU (paras 30–31, with reference to *Raugevicius*, and *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)*).

- **A Member State's rule on extradition which gives rise to a difference in treatment is a restriction on the freedom to move and reside and can be justified only where it is based on objective considerations and is proportionate to the legitimate aim of national law.**
  - A national rule which introduces a difference in treatment between nationals of the requested Member State and EU citizens who reside there permanently, by prohibiting only the extradition of the former gives rise to a restriction on the freedom to move and reside in the territory of the Member States, within the meaning of Article 21 TFEU (para 34, with reference to *Raugevicius* and *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)*).
  - The objective of avoiding impunity must be considered a legitimate objective and may justify a measure that restricts a fundamental freedom, but only if that measure is necessary and cannot be attained by less restrictive measures (para 36, with reference to *Raugevicius* and *Generalstaatsanwaltschaft Berlin (Extradition to Ukraine)*).
  - There are mechanisms/alternatives under national law and/or international law, which make it possible for persons to serve their sentences in particular in the state of which they are nationals or where they are resident (paras 37–41, with reference to *Raugevicius*).
- **Obligation for the requested Member State to actively seek to ascertain whether there is a less prejudicial alternative to extradition and to actively seek, if applicable, the consent of the third State.**
  - If the alternative to extradition consists in the EU citizen to serve their sentence in the requested State, but such application is conditional upon obtaining the consent of the third State which made the extradition request, Articles 18 and 21 TFEU require the requested Member State to actively seek the consent of that third State (para 49).
  - If Bosnia and Herzegovina consents to the custodial sentence being served in Germany, the application of that alternative to extradition would not necessarily result in Germany being in breach of its obligations towards that third State under the European Convention on Extradition, as the application of that alternative would seem to render the execution of the extradition request superfluous, but it is for the referring court to ascertain whether this is the case (paras 51–52).
- **If there is no less prejudicial alternative available, the requested Member State can extradite the EU citizen to the third State subject to compliance with the Charter.**
  - If Bosnia and Herzegovina does not consent to the custodial sentence being served in Germany, the alternative to extradition required by Articles 18 and 21 TFEU could not be applied. In that situation, Germany can extradite the person concerned in accordance with its obligations under that convention, since a refusal to extradite would not, in that case, enable the risk of that person going unpunished to be averted, and the extradition then constitutes a necessary and proportionate measure for attaining that objective (paras 53–54).
  - In accordance with the CJEU's settled case-law, the requested Member State must nevertheless check that the extradition will not infringe the rights guaranteed by the Charter, in particular Article 19 (para 55, with reference to *Raugevicius* and *Ruska Federacija*).

© Eurojust, 2024

Eurojust, Johan de Wittlaan 9, 2517 JR The Hague, The Netherlands
www.eurojust.europa.eu • info@eurojust.europa.eu • +31 70 412 5000
Follow Eurojust on X, LinkedIn and YouTube @Eurojust

Catalogue number: QP-01-24-010-EN-N • ISBN: 978-92-9404-381-8 • DOI: 10.2812/3519476

Eurojust is an agency of the European Union