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EUROPEAN ARREST WARRANT AND INDEPENDENCE OF THE JUDICIARY. EVOLUTION OR REVOLUTION?

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It was clear from the beginning that the European Arrest Warrant (EAW) would become the centre of many interpretative controversies in national courts, as well as at the Court of Justice of the European Union (CJEU) in Luxembourg. The declared and consistently repeated aim of substituting extradition with a streamlined system of surrender between judicial authorities could certainly not be pursued without consequences – especially with regard to fundamental rights protection, as the *Melloni* judgment showed with all its might. It was not entirely predictable, however, that the Court would use the EAW Framework Decision (FD) to carry out a process of judicial harmonisation by qualifying a key words to the EAW mechanism (deprivation of liberty, residence) as *autonomous concepts* of EU law, so reducing the space for national discretion. Even less predictable, probably, was that that process would involve one of the most innovative yet least controversial features of the EAW: the shift from the executive to the judiciary as the institutional actor in charge of cooperation.

As known, the EAW is the flagship of a new era of cooperation in criminal justice within the EU which started at the 1999 Tampere Council. Mutual

recognition was adopted there as the future cornerstone of judicial cooperation. A decision issued by member state 'A' (issuing state) and addressed to member state 'B' (executing state) should be recognised and executed by the latter without further formalities *unless grounds for refusal apply*. Automaticity in judicial cooperation rests on the principle of mutual trust, namely the rebuttable presumption that member states, *save in exceptional circumstances*, comply with fundamental rights. Therefore, the system clearly operates on the basis that trust, execution and surrender are the rule and room for exception is quite limited.

Over the years, with the contribution of the CJEU's case-law, three main areas of exceptions emerged. Firstly, there are the mandatory and optional grounds for refusal enumerated in Articles 3 and 4 EAW FD. Secondly, the Court found for the first time in the *Căldăraru* and *LM* judgments that an EAW must not be executed when there is a risk of fundamental rights violation in the issuing state. The former case set the test, and concerned possible breaches of the absolute prohibition of inhumane and degrading treatment due to poor detention conditions; in *LM*, the Court developed and applied that test to the right to a fair trial. Revolving around an EAW issued by Poland to Ireland, the Court stated that the right to an independent tribunal constitutes part of the essence of the right to a fair trial, cornerstone of the rule of law and therefore of the EU's values under Article 2 TEU. The executing judge must refrain from executing the EAW, where there is material indicating (1) systemic deficiencies in the issuing state concerning that right, and (2) the risk that those deficiencies will affect the specific case of the person concerned. Thirdly, the EAW must not be executed when it is invalid – for example, because it was issued without an underlying national arrest warrant.
The recent judgments of the CJEU in Joined Cases C-508/18 and C-82/19 PPU *Minister for Justice and Equality v OG and PI* and Case C-509/18, *Minister for Justice and Equality v PF*, bring significant contribution to the debate concerning the independency of the judiciary in EU member states, fundamental rights in the EAW mechanism and interaction between different exceptions to execution.

The starting point is the definition of a EAW which, according to a joint

reading of Articles 1 and 6 FD, is a judicial decision issued by a member state judicial authority. Over recent years, the CJEU has had the opportunity to define *autonomously* the concept of *judicial authority*. In particular, police service and ministry of justice cannot be considered *judicial authority*. Therefore, EAWs issued by those authorities cannot be considered valid. The CJEU founded its reasoning on the premise that the high level of confidence on which the EAW is built requires proper judicial oversight, which in turn can be guaranteed in the presence of respect for judicial independence and separation of powers.

In the cases at hand, the referring courts asked whether the German and Lithuanian Public Prosecutor's Offices are *judicial authorities* under Article 6(1) EAW FD. The two judgments develop on the same grounds, although conclude with opposite outcomes due to the systemic differences between the two member states' judiciaries.

Firstly, the Court clarified that *judicial authority* is capable of including authorities of a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State. Mutual recognition concerns decisions adopted in criminal proceedings, including those relating to the pre-trial phase, the trial itself and the enforcement of a final judgment. The very EAW can be issued for conducting a criminal prosecution or for executing a sentence.

Secondly, the CJEU recalled that the EAW system entails a dual level of protection of procedural and fundamental rights: the first level relates to the adoption of the national decision, such as a national arrest warrant; whereas the second must be afforded when a EAW is issued (*Bob-Dogi*, C 241/15, EU:C:2016:385, para 56). In the context of the EAW, the requirements inherent in effective judicial protection must be met at least at one of the two levels of protection. Where the law of the issuing Member State confers the competence to issue a EAW on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision on which the EAW is based must meet those requirements. The second level of protection entails that the judicial authority competent to issue a EAW must review observance of the conditions necessary for the issuing of the

warrant and examine whether it is proportionate to issue that warrant (*Kovalkovas*, C□477/16 PPU, EU:C:2016:861, para 47).

Thirdly, the issuing judicial authority must ensure that second level of protection, even where the EAW is based on a national decision delivered by a judge or a court. 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.

Fourthly, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which is not itself a court, the decision to issue such an arrest warrant and the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

On that basis, in *PF* the Court observed that the Prosecutor General of Lithuania prepares the ground for the exercise of judicial power by the criminal courts of that Member State. Therefore, it is capable of being regarded as participating in the administration of criminal justice in the member state in question.

In exercising the powers conferred on him, the Prosecutor General of Lithuania must satisfy himself that the requirements necessary to issue a EAW are met. The constitutional framework of Lithuania, furthermore, guarantees the Prosecutor General of Lithuania the benefit of that independence. This led the Court to the finding that that authority falls under the conceptual scope of Article 6(1) EAW FD. However, the CJEU took care to clarify that it is for the executing judge should determine whether a decision of the Prosecutor General to issue a EAW may be the subject of court proceedings which meet in full the requirements inherent in effective judicial protection.

In *OG*, the CJEU came to the opposite conclusions in the case of the German Public Prosecutor's Office. According to German Law, the German Minister for Justice has an 'external' power to issue instructions in respect of those public prosecutors' offices, which in turn enables them to have a

direct influence on a decision concerning the EAW. While featuring safeguards concerning dismissal of officials and modality of writing and notification of the instructions, such safeguards cannot wholly rule out the possibility influence of the executive on the decision concerning the issuing of a EAW. Therefore, the Public Prosecutor's Offices cannot be considered judicial authorities under Article 6 EAW FD.

These judgments form part of a bigger picture, with the CJEU developing at least three threads of case-law on judicial independence: non-execution of the EAW via *LM*, definition of judicial authority under Article 6 EAW FD, and review of national reforms of the judiciary through Article 19 TEU. While the reasons for the emergence of this jurisprudence and the CJEU's resolve in defending it are not surprising, their mutual compatibility and 'fit' remain to be seen. The CJEU seems to state that an EAW can be validly issued *as long as* the authority responsible guarantees a sufficient level of independence. This stricter scrutiny imposed by the CJEU is undoubtedly connected to the circumstance that the issuing authorities in the cases discussed were not courts. However, independence – from the executive especially – was key to the Court's reasoning. The connection between independence, judicial authority and valid issuance of a EAW is so strong that the following question arises: could this case-law apply to situations where the independence of a state judiciary is at risk of systemic deficiencies? On the one hand, the *LM* test provides for non-execution of a EAW after verification that lack of independence could affect the person concerned; on the other, the *OG* principle might call into question the very validity of those EAWs issued *at a time where* independence was already threatened. Invalidity entails much very serious consequences, including the by-passing of the individual assessment prescribed by *LM*. This, in turn, might open the door to a quasi-suspension of the EAW to a specific state, which according to the FD can take place only according to a decision of the European Council. While these questions might appear as purely speculative at the moment, the evolutionary case-law(s) of the CJEU on independence and EAW is prone to constitutional dilemma.