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ПРАВНИ ФАКУЛТЕТ

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THE EUROPEAN ARREST WARRANT AND THE ROLE OF PUBLIC PROSECUTORS

Abstract

The European Arrest Warrant (EAW) is one of the most used mechanisms in judicial cooperation in criminal matters. It consists of simplified procedure for cross-border surrender for purposes of prosecution or executing a prison sentence or detention order, thus replacing the traditional system on cooperation including the political authorities of member-states.

The paper aims to explain the role of Public Prosecutors in the procedure of issuing the EAW through the practice of the Court of Justice of the European Union (CJEU). The paper deals with two parts: first, it elaborates case law by which the Court secured additional clarification of the long-standing question regarding the definition of "judicial authority" responsible for issuing the EAW and second, it elaborates the jurisdiction of public prosecutors in member-states in their capacity to issue the EAW. Both parts explain court cases and judgements brought upon. With these judgment, the CJEU further develops its jurisprudence regarding the functioning of the EAW in the criminal justice area.

The conclusion explains the impact of these judgments in national law of member-states, as well as on the whole area of criminal justice in the EU, implying the need of evaluation and possible reform of criminal justice organization in certain member-states.

Key words: arrest warrant, public prosecutor, Court of Justice, case-law

1. INTRODUCTION

The European Arrest Warrant (EAW) is a measure of EU's criminal law, applicable among judicial authorities of EU member-states, according the principle of mutual recognition, where the extradition procedure is replaced by simplified and expedited procedure.[1] A member-state issuing the EAW may request that it be carried

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[1] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1; Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions

out in any other EU member-state. The Framework Decision for the European Arrest Warrant (FDEAW) provides for a catalogue of 32 offences in which mutual trust is at a higher level, meaning that extradition (or using the correct terminology – surrender) may only be refused on limited grounds.

The basis for the FDEAW system is simple: EAW issued by one member-state must be executed in another member-state, unless the FDEAW requests or allows non-execution. For other offences not provided for in the catalog, the national provisions of criminal law apply. More importantly, the surrender is a judicial proceeding, unlike extradition, which is a political decision most often made by the Minister of Justice, rather than by a judge. A precondition for such cooperation is mutual trust and the assumption that the same legal criteria are applied through the provision of fundamental rights, especially the right to a fair trial.

The warrant refers to offenses punishable by imprisonment of more than one year or imprisonment for more than four months or a warrant for detention of more than four months. The decision of the court ordering the deprivation of liberty and return of the person for the purpose of conducting a criminal procedure, execution of imprisonment or detention shall be carried out without delay by the court of the state in which the person is at the latest within 90 days. The surrender of a person may be refused only under the following conditions: if it is convicted of the same offense; in case of amnesty; or the person cannot be held criminally responsible due to his/her age. The State requesting the extradition of a convicted person may, instead of extraditing him, execute the judgment sought by the requesting State itself.

The FDEAW text leaves numerous unanswered question. These refer, above all, to the very notion of the EAW. As the National Arrest Warrant (NAW), the EAW is a decision of a competent court or judicial authority or arrest order of a person for purposes of conducting criminal investigation or execution of sentence or detention order. However, the Court of Justice of the European Union (CJEU) made it clear that for the purposes of FDEAW it is crucial to distinguish between NAW and EAW.

Further, the FDEAW requires the EAW to be issued by judicial authority. The same applies to the execution of the EAW and the NAW on which it must be based. The FDEAW envisions a "judicial" system in which key decisions are made by the judiciary and the role of government or executive bodies are only limited to providing administrative and practical assistance to the judiciary. Therefore, it is important to determine what constitutes a "judicial authority". The FDEAW requires member-states to determine which judicial authority will be competent to issue or execute the EAW, but does not define the very term of "judicial authority". In practice, this has led to differences between member-states, with some of them having established bodies that look more like political rather than judicial.

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 81/24.

2. PREVIOUS CASE LAW

2.1. National Arrest Warrant

In its judgment of *Bob-Dogi* case, brought on June 1, 2016, the CJEU had the opportunity to decide on Article 8, paragraph 1, point c of the FDEAW regarding the consequences of the absence of the NAW issued before and separately from the EAW in case of a request for surrendering a person based on the EAW.[2]

In the present case, the Romanian executive authority received a request for extradition from a Hungarian body based only on the EAW, which was not based on a previous, separate NAW. The Romanian court, as an executive authority, found that the EAW had also expanded into Hungary and assumed that the EAW was also the NAW. This assumption turned out to be correct. Hungarian law provides for a "simplified procedure" in cases where the concerned person is already outside the territory of Hungary when the EAW is issued. In such a case, no separate NAW has been issued.

At the same time, the EAW constitutes an NAW. The Romanian court has questioned whether this is compatible with Article 8, paragraph 1 of the FDEAW, which stipulates that the EAW, *inter alia*, must comply with "evidence of an enforceable judgment, an arrest warrant or other enforcement decision with the same effect". The concerned court decided to refer to the CJEU in a preliminary ruling procedure on whether the FDEAW requests a previous and special arrest warrant and if that is the case, whether the absence of such an arrest warrant implies grounds for non-execution of the EAW. The CJEU confirmed that the FDEAW requires the EAW to contain evidence of NAW or a comparable decision. The CJEU has interpreted this to imply that the EAW must be based on a national judicial decision that takes the form of a decision to issue an NAW or a similar decision.

According to the Court, where the EAW is issued for purposes of conducting criminal investigation does not contain a reference to the existence of the NAW, the executive judicial authority cannot give effect to it if, upon request from the issuing authority, it submits all additional information as a matter of urgency, that authority confirmed that the arrest warrant had in fact been issued in the absence of any NAW. The CJEU clarified that the compliance with the requirement that there be an NAW different from the EAW is of particular importance because it means that, where the EAW was issued in order to prosecute, the person concerned should already benefit, at the first level of the proceedings, from procedural safeguards and fundamental rights, the protection of which is the task of the issuing authority to ensure in accordance with applicable national law. That judicial protection is lacking, in principle, when the issue of the EAW is not preceded by a decision made by a national judicial authority.

Referring to these goals, the CJEU explained that the FDEAW imposes a double level of protection for procedural and fundamental rights of the requested

[2] Court of Justice, Judgment of the Court, Case C-241/15 Niculaie Aurel Bob-Dogi v Curtea de Apel Cluj, 2016, ECLI:EU:C:2016:385.

person: the first concerns on judicial protection provided at the level at which the NAW was issued; the second refers to the protection that must exist when adopting the decision to issue the EAW. This double level of judicial protection was lacking, in principle, according to the simplified procedure that existed in Hungary as only one decision was adopted, and not two according the FDEAW.

At the end, the CJEU found that the absence of any indication in the EAW of the existence of the NAW was not one of the grounds for non-execution listed in the FDEAW. However, the CJEU stressed that the FDEAW is based on the premise that EAW mentions a national arrest warrant or a comparable decision. Failure to do so implies that the EAW is invalid, which in turn means that the executing authority must refuse the execution of the EAW.

2.2 The Concept of Judicial Authority

In the cases of *Poltorak,*[3] *Kovalkovas*[4] and *Ozcelik*[5], the Amsterdam Court, as competent to prosecute EAW under Dutch law, decided to refer to the CJEU in preliminary ruling procedure for a legal explanation of the exact meaning of the "judicial authority". These cases relate to the pre-trial proceedings filed by the Amsterdam District Court, which received three ENAs. Specifically, in the *Poltorak* case, the EAW was issued by the Swedish Police Board. In the *Kovalkovas* case, the EAW was issued by the Lithuanian Ministry of Justice. Finally, in the *Ozcelik* case, the EAW was issued by the Hungarian police, but later confirmed by the public prosecutor. The Amsterdam District Court referred to the CJEU to clarify whether the police authorities in *Poltorak* and *Kovalkovas* case could be considered as bodies covered by the term "judicial authority" under Article 6, paragraph 1 of the FDEAW. The referring court, also asked the CJEU whether the public prosecutor's confirmation of the intentions to issue the EAW, previously issued by the police, could be considered to be covered by the term "judicial decision" under Article 8, paragraph 1 of the FDEAW.

In cases of *Poltorak* and *Kovalkovas*, the CJEU held that the terms "judicial authority" and "judicial decision" are an autonomous concept of the EU law and "are not limited to designating only the judges or courts of a member-state, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned" This includes criminal courts and judges of a member-state, but not police services and executive such as ministers. The CJEU explained that the term "judicial" must be distinguished from the executive, in accordance with the principle of separation of powers. Hence, judicial bodies are traditionally explained as authorities for delivering justice, unlike administrative or police bodies,

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[3] Court of Justice, Judgment of the Court, Case C-452/16 Openbaar Ministerie v. Krzysztof Marek Poltorak, 2016, ECLI:EU:C:2016:858.

[4] Court of Justice, Judgment of the Court, Case C-477/16 Openbaar Ministerie v. Ruslanas Kovalkovas, 2016, ECLI:EU:C:2016:861.

[5] Court of Justice, Judgment of the Court, Case C-453/16 Openbaar Ministerie v. Halil Ibrahim Ozcelik, 2016 ECLI:EU:C:2016:860.

which fall under the mandate of the executive branch. The issue of issuing EAWs by “central authorities” such as the police service or ministries does not provide the judicial authority with the certainty that the decisions related to EAW “cover all judicial guarantees” and therefore cannot provide a "high level of trust" between states-members as required by mutual recognition principle.

After finding that the term “judicial authority” is an autonomous concept of the EU, the CJEU continued to broadly construct the notion by covering national bodies that administer criminal justice, but not the police service. As a result of this reasoning, the CJEU concluded that, in the *Ozcelik* case the confirmation by the public prosecutor of the issued EAW for the purposes of conducting criminal proceedings by the national police authority is a legal act that the public prosecutor verifies and confirms the issue of the EAW and thus constitutes a “judicial decision” within Article 8, paragraph 1, point c of the FDEAW.

The CJEU conclusions are logical. Common sense simply dictates that police and ministries cannot be considered as judicial authorities. It would be strange and really undesirable if the courts of the member-states executing the EAW were obliged to act on the orders of foreign police officers or politicians. For the whole system to be legitimate, there must be guarantees that the EAW is issued with respect to the right to a fair trial and other fundamental rights. Such guarantee could not be given to the police or other politically controlled bodies. In the *Ozcelik* case, the CJEU found that the public prosecutor’s office could be considered as a judicial authority for the FDEAW’s purposes. However, the precise powers and duties of public prosecutors in other member-states may vary and not all offices may provide the guarantees of procedural and fundamental rights required to satisfy the CJEU. Therefore, in determining whether public prosecutors can be labeled as a “judicial authority” authorized to issue an EAW, a case-by-case analysis is required.

3. THE EAW AND THE ROLE OF PUBLIC PROSECUTORS

After explaining the role of the NAW when issuing the ENAW, as well as the concept of “judicial authority” through the CJEU’s case law, it is more controversial that the issuing judicial authority must act "impartially" and "objectively" from the executive when issuing the ENA. As the CJEU has already ruled in the cases of *Poltorak* and *Kovalkovas*, the term “judicial authority” does not have to be strictly interpreted as referring only to judges and courts of member-state, but also covers “the authorities participating in the administration of criminal justice in that member-state”, such as the Hungarian prosecutors in the *Oçzçelik* case. This broad interpretation is supported by the EAW's explanation, which aims to facilitate the free movement of judicial decisions, including those before the judgment regarding the conduct of criminal proceedings. With regard to the functions performed by prosecutors in these three cases, the Court considered that this criterion was easily met, as the authorities in question play an essential role in the conduct of criminal proceedings in their member-states.

Following the principles of separation of powers, this basic requirement aims to ensure that the rule of law prevails and that the fundamental rights of the person concerned are effectively protected, in the absence of any political considerations.

For example, in the *LM* case from 2018, involving the extradition of a Polish citizen in Ireland, the CJEU had already taken a stand on the independence of the judiciary in the context of the EAW, which is especially important if such a mechanism allows deprivation of liberty.[6] The Court, relying on applicable EU protection standards, examined whether the competent authorities were able to provide a sufficient level of judicial protection when issuing an EAW. Moreover, it reaffirmed that, as a matter of principle, the judicial authority competent to execute the EAW must refuse the extradition if it considers that there is a real risk that the person concerned will suffer a violation of his fundamental rights before an independent tribunal, and thus the essence of his fundamental right to a fair trial, because of the shortcomings that may affect the independence of the judiciary in the member-state.

On May 27, 2019, the CJEU, through a new ruling, provided further clarification on the long-standing question of the definition of "judicial authority" responsible for issuing the EAW and decided on the independence to be determined under the EU law. It responded to the doubts regarding the capacity of the public prosecutor's offices of member-states to issue EAWs, a doubt raised by the cases explained above.

In May 2016, the Germany's Public Prosecutor's Office of Lübeck issued an EAW against a Lithuanian citizen residing in Ireland for premeditated murder and serious injury in 1995. Also, in March 2018, the Germany's Public Prosecutor's Office of Zwickau issued an EAW against a Romanian citizen who is also residing in Ireland for the crime of organized or armed robbery. The two cases were merged into one due to the referral of a common question concerning Article 6, paragraph 1 of the FDEAW regarding the identification of a "judicial authority".[7] More specifically, before the Irish courts, the defendants challenged the execution of the EAWs, claiming that the public prosecutors of Lübeck and Zwickau were not a "judicial authority" under Article 6, paragraph 1 of the FDEAW. Before the CJEU were presented a number of question in preliminary ruling procedure concerning the position and role of the German Public Prosecutor's Office in its connection with the executive branch. The last and key question is: are Lübeck's or Zwickau's public prosecutors judicial authorities under Article 6, paragraph 1 of the FDEAW?

3.1 German Law and the EAW

As noted, the EAW is based on the idea that EU member-states recognize the decisions of their judicial authorities and implement them as soon as possible. The system is based on mutual trust, but not every member-state has the same authority for issuing the EAW. As for the abovementioned, the procedure in Germany is not a special case. In most member-states, it is common practice for a public prosecutor to issue an EAW after a judge issues a NAW. It is different in countries like France and

[6] Court of Justice, Judgment of the Court, Case C-216/18 Minister for Justice and Equality v. LM, 2018, ECLI:EU:C:2018:586.

[7] Court of Justice, Judgment of the Court, Joined Cases C-508/18 and C-82/19 Minister for Justice and Equality v OG and PI, 2019, ECLI:EU:C:2019:337.

Spain, where investigative scrutiny is responsible. However, persecution in most member-states is organized strictly independently and there is no jurisdiction or influence from the executive. Other member-states where their public prosecutors are responsible for issuing the EAW are, for example, Austria, Bulgaria, the Netherlands, Portugal, Romania and, in some cases, Sweden. Furthermore, in Belgium, Luxembourg and Italy, public prosecutors are responsible for issuing the EAW in connection with the execution of the sentence, while in Estonia and France, public prosecutors are responsible for prosecution under the EAW.

In Germany, public prosecutors are responsible for prosecution and are subordinate to the Ministry of Justice and may be subject, directly or indirectly, to specific guidelines or instructions from that body in connection with the adoption of the decision to issue the EAW. Unlike the judges, whose independence is guaranteed by the Constitution, prosecutors are not free to work. The German prosecutor's office is organized in a hierarchical structure, headed by the Minister of Justice of the *Land* in which the prosecutor works. There is one public prosecution office each at the Regional Courts and these public prosecution offices are subordinate to the Regional public prosecution office. The Regional public prosecutor is subordinate to the Minister of Justice of the *Land*. On the federal level, the Federal Public Prosecution Office is subordinate to the Federal Minister of Justice. According to sections 146 and 147 of the Courts Constitution Act, prosecutors are required to follow instructions from the authorities, including their Minister of Justice.[8]

A longer answer would require giving a certain nuance to this strict image, including the fact that the right to issue instructions on ministerial level are extremely rare and, when they occur, are always accompanied by considerable public attention or by transparency requirements. However, it is fair to conclude that in light of the CJEU’s strict approach to the criterion of independence, the German public prosecutor's office is not, in fact, independent in the broadest sense required of the FDEAW. Under these conditions, is a German public prosecutor sufficiently independent to be considered as judicial authority within the meaning of Article 6, paragraph 1 of the FDEAW? The Irish Court referred this question to the CJEU.

The right of the executive to issue instructions to public prosecutors has been controversial in Germany, and the reasons are obvious, as the politicians can theoretically influence who is under investigation and who is accused. The counter-argument is also known for a long time, as the right to give instructions exists so that one can take political responsibility if the state allows its powers to enforce the law against certain individuals.

So what does this mean in the context of the EAW? For a member-state to execute an EAW on its territory and with its authorities requires a great deal of trust. The Ministry of Justice so-called “external right to instructions” on German public prosecutors have been debated in Germany for decades, and although there have been few cases in which the minister has actually taken advantage of this, the very existence and use of that right casts a shadow over the prosecution's independence.

[8] https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.html.

3.2 The CJEU Judgment

In this regard, the Court reiterates that the EAW mechanism is based on a dual level of protection of procedural rights and fundamental rights, referring to the judgment of *Bob-Dogi* from 2016, regarding the distinction between the NAW and the EAW. It requires effective judicial protection of the right of the person concerned to be granted at the time the NAW is adopted and at the stage when the EAW is issued.

Although it is the responsibility of the "issuing judicial authority" to guarantee a second level of protection, the Court requires that it be able to perform its responsibilities objectively and impartially. So, the CJEU continued to test those claims against the situation in the German public prosecutor's office. In the joined case of the two German EAWs (C-508/18 and C-82/19 PPU), the German public prosecutor does not meet the requirements to act independently of the executive branch in issuing the EAW.

In its judgment of May 27, 2019, the CJEU confirmed, based on its previous case-law that the public prosecutors are bodies involved in the administration of criminal justice. It also confirmed that the concept of "judicial authority" is not limited only to judges or courts but more broadly to bodies "involved in the administration of criminal justice" in each member-state, other than the ministers and police services that are part of the executive branch. This concept is being extended to the public prosecutor's offices, which are competent, in criminal proceedings, to prosecute persons suspected of having committed a crime so that that person can be brought before a court. Accordingly, the CJEU has ruled that German public prosecutors do not provide a sufficient guarantee of independence from the executive branch when issuing the EAW. The Court has found that the "issuing judicial authority" must be able to carry out its responsibilities objectively and its independence must be guaranteed by statutory rules and an institutional framework.

According the judges, the executive cannot, under any circumstances, give the judicial authority any instructions or guidelines for an investigation, even if those powers are not applied in practice. In the case of Germany, the two public prosecutors who have issued extradition requests and are responsible for prosecution have been found to be subordinate to the German Ministry of Justice, which means they may be subject, directly or indirectly, to guidance and instruction in certain cases.

Furthermore, the CJEU emphasized the double level of protection of procedural and fundamental rights in the EAW system: first, the person must benefit from the protection of procedural and fundamental rights in respect of the decision to issue the NAW; and second, these rights must also be protected at the stage when the decision to issue the EAW is made. The issuing judicial authority must confirm the proportionality of the issued EAW in each case individually. The second level of protection of the rights of the affected person means that the judicial authority must evaluate, in particular, the compliance with the conditions required for the issue of the EAW and examine whether, in the specific circumstances of each case, it is proportionate to issue that warrant, even when the EAW is based on a national decision made by a judge or court. In addition, where the right of the issuing member-state gives the authority to issue an EAW to a body which, while participating in the

administration of justice in that member-state, is not in itself a court, the decision to issue such an arrest warrant, *inter alia*, and the proportionality of such a decision must be able to be subject of a court proceeding that fully meets the requirements inherent in effective judicial protection in the member-state.

The "issuing judicial authority" must be able to carry out its responsibilities objectively. In order to perform its role, the judicial authority must be able to take into account all the incriminatory and exculpatory evidence, without exposing itself to the risk that its decision-making authority may be subject to external instructions, in particular by the executive, so there is no doubt that the decision to issue the EAW lies within that authority, not within the executive. The independence of the issuing judicial authority must be guaranteed by statutory rules and an institutional framework. The issuing judicial authority must be in a position to provide a guarantee to the executive judicial authority that, in respect of the guarantees given by the legal order of the issuing member-state, it shall act independently in carrying out the responsibilities inherent in issuing the EAW. In particular, the issuing judicial authority must demonstrate that there is a statutory rule and institutional framework capable of ensuring that it is not exposed when the decision to issue an arrest warrant is made, at any risk of being subject to inter alia, at instructions from the executive in a particular case.

On the other side, the German government argued that the decisive criterion is not the complete independence of the public prosecutor, but his participation in the judiciary. The independence of the prosecutor should not be confused with the independence of the judiciary. Contrary to the judge's actions, the prosecution did not request a full separation from the executive branch, with the result that oversight and instructions are permissible. According to this argument, there is a double standard for independence, and the public prosecutor's office is gradually less independent. Despite such arguments from the German government that such authorization for instructions is covered by the German law, these guarantees were considered insufficient by the CJEU. As a result of this strict interpretation, German public prosecutors are no longer allowed to issue EAWs.

4. ADDITIONAL CJEU CLARIFICATION – THE CONCEPT OF "EFFECTIVE JUDICIAL PROTECTION"

The question of who is authorized to issue the EAW has been re-addressed through the courts in Luxembourg and the Netherlands which referred to the CJEU, in a preliminary ruling procedure, whether the prosecutors of Belgium, France and Sweden are qualified as "judicial authorities" for the purposes of issuing the EAW. The questions were raised in relation to the EAW issued by the Belgian Public Prosecutor for the purposes of serving a prison sentence[9] and in relation to the EAW

[9] Court of Justice, Judgment of the Court, Case C-627/19 ZB v. Rechtbank Amsterdam, 2019, ECLI:EU:C:2019:1079.

issued by the prosecutors of Sweden[10] and France[11] for the purposes of conducting a criminal investigation. More specifically, the courts of the Netherlands and Luxembourg have requested further clarification of the CJEU's judgments of May 27, 2019, in respect of German public prosecutors who have been found not to provide sufficient guarantee of independence from the executive branch when issuing the EAW.

According the principle of procedural autonomy and Article 6 of the FDEAW, the member-states are the ones who determine the competent "issuing judicial authority" for the purposes of the EAW, but the CJEU has determined that this requires uniform and autonomous interpretation. Public prosecutors will qualify as a judicial authority when two conditions are met: first, the public prosecutor must enforce or participate in the administration of justice; and second, the independence of public prosecutors must be legally established by organizational rules that will prevent prosecutors from being subject to the instructions from the executive.

The CJEU set a third condition regarding the concept of "effective judicial protection" through the ability of prosecutors to assess the necessity and proportionality of issuing EAW. In these judgments, the CJEU focuses on national legal framework for assessing the independence of the prosecution and is satisfied when legal and organizational rules formally prevent the government from issuing individual instructions to the prosecuting authority.

The executing authority must confirm that the decision to issue the EAW is subject to prior judicial protection, i.e. that the court or judge has assessed the proportionality of the EAW and that the conditions for issuing the EAW have been met. In other words, the decision of the prosecutor, who is not a judge, to issue an EAW must be able to be a subject, in a member-state, in court proceedings that fully meet the requirements for effective judicial protection. In these cases, the CJEU considered that each of the surveyed national systems in Belgium, Sweden and France met the requirements for effective judicial protection.

First, in the Swedish case, national law requires the decision to issue an EAW to be preceded by a court decision to order pre-trial detention. The CJEU confirmed that effective judicial protection is provided when the court confirms the conditions and proportionality of the EAW before it is issued by the prosecutor, i.e. during the hearing in relation to pre-trial detention. The Court also emphasized that the pre-trial detention order could be challenged after it is issued, and when the challenge is successful, the EAW is automatically suspended. For the CJEU, this system meets the requirements for effective judicial protection, even in the absence of an independent appeal procedure against the prosecutor's decision to issue the EAW.

Second, in the French case, the CJEU considered that under French law, the EAW for criminal investigation purposes could be issued after a judge, usually an investigating judge, had issued a NAW. In this case, the CJEU noted that a judge who

[10] Court of Justice, Judgment of the Court, Case C-625/19 XD v. Rechtbank Amsterdam, 2019, ECLI:EU:C:2019:1078.

[11] Court of Justice, Judgment of the Court, Joined Cases C-566/19 and C-626/19 JR and YC v. Cour d'appel and Rechtban Amsterdamt, 2019, ECLI:EU:C:2019:1077.

issued the NAW also asked the public prosecutor to issue the EAW at the same time. At this point in the proceedings, the judge ruled that the conditions for issuing the EAW were met, including its proportionality. According to the CJEU, this procedure demonstrates that the proportionality of EAW can be assessed at the time the NAW is issued, which occurs before or at the same time when issuing the EAW, and notes that the decision to issue the EAW may also be subject to additional procedure for annulment. As a result, the French system meets the requirements for effective judicial protection.

Third, where the EAW has been issued for the purpose of serving a prison sentence, as in the Belgian case, the EAW derives from a court decision to impose a prison sentence. The existence of a court proceeding with a prison sentence allows the executive to assume that the decision to issue the EAW stems from a national procedure in which the person's rights are respected; and the proportionality of the EAW stems from the FDEAW’s claim that EAW can only be issued regarding imprisonment of at least 4 months. In such circumstances, the request for effective judicial protection is met by the decision to punish the concerned person.

5. CONCLUSION

German prosecutors can no longer issue EAW. After the CJEU judgment, it was emphasized that in the future EAW should be issued by judges according the German judicial organization. This can lead to additional work, but it can have less serious consequences than it appears at first glance. Effective EAW assumes that an executive judgment, arrest warrant or other executive judicial decision has legal effect under Article 8, paragraph 1 of the FDEAW. In order to continue participating in the ENA system, German law must transfer jurisdiction either to the courts (for example, to the investigating judge at the request of the public prosecutor) or to the public prosecutor's office by abolishing the external instructions.

With these judgments, the CJEU further develops its jurisdiction regarding the EAW in the field of criminal justice, in which mutual trust should not be confused with “blind” trust. The Court has taken a more balanced approach between the fundamental rights of the person subject to an EAW and the EU's goal to guarantee the free movement of judicial decisions, an orientation that seems to be confirmed by the recent case law.

Behind the influence of the individuals affected by EAW, the decisions of the Court significantly contribute to the clarification of the term “judicial authority” through an autonomous definition. First, it confirms that this notion may extend beyond the courts and involve public prosecutors. Second, with regard to the standards of protection of fundamental rights, it clarifies the guarantees arising from the role of the “issuing judicial authority”, namely the need for independence. While this is a significant step towards effective judicial protection, it includes new issues for consideration by the competent authorities of member-states. It implies that the executive authorities will have to confirm whether the issuing authorities are qualified as independent judicial bodies, within the meaning of the CJEU case law, before deciding to surrender over the requested person.

The EAW is always based on a previous NAW or sentence, both of which must be issued by a court, which must presume the strictest level of independence from the beginning. However, in its judgment, the CJEU confirmed the double level of protection. The first level of protection is granted when a national court decision has been made; the second, when the national decision is transformed into EAW. Hence, the CJEU argued that when a second decision is not made by a court or judge, it must be confirmed that the responsible authorities give the requested person the same level of protection of rights as a court – this requires strict independence from external influences such as instructions or directions, especially at the political level.

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ЕВРОПСКИ НАЛОГ ЗА ХАПШЕЊЕ И УЛОГА ЈАВНИХ ТУЖИЛАЦА

Сажетак

Европски налог за хапшење (ЕНХ) један је од најчешщће коришщћених механизама у правосудној сарадњи у кривичним стварима. Састоји се од поједностављеног поступка прекограничне предаје у сврху кривичног гоњења или извршења затворске казне или притвора, чиме се замењује традиционални систем сарадње, укључујући политичке органе држава -чланица.

Циљ рада је објаснити улогу јавних тужилаца у поступку издавања ЕНХ-а кроз праксу Суда правде Европске уније (СПЕУ). Овај рад има два дела: први у којем разрађује судску праксу којом је Суд осигурао додатна појашњења дугогодишњег питања у вези са дефиницијом „правосудног органа“ одговорног за издавање ЕНХ и други у којем разрађује надлежност државних тужилаца у државе чланице у својству издавања ЕНХ. Оба дела објашњавају судску праксу и донесене пресуде. Са пресудама, СПЕУ даље развија своју јуриспруденцију у погледу функционисања ЕНХ у кривично-правосудне области.

Закључак објашњава утицај ових пресуда на национално право држава-чланица, као и на читаво подручје кривичног правосуђа у ЕУ, имплицирајуци́ потребу за евалуацијом и могућом реформом кривично-правне организације у одређеним државама чланицама.

Кључне речи: налог за хапшење, јавни тужилац, Суд правде, судска пракса

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