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NOTE

From:	Presidency
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Subject:	Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Recent CJEU judgments and application of existing case-law - Exchange of views = Information paper by the Presidency on the CJEU judgments in case C-489/19 PPU (NJ) and C-128/18 (Dorobantu)

Case C-489/19 PPU (NJ) - Concept of ‘issuing judicial authority’

Introduction

On 27 May 2019, the Court of Justice of the European Union (CJEU) delivered its judgment in cases C- 508/18 and C- 82/19 PPU (OG and PI). In that judgment, the CJEU ruled as follows:

"The concept of an ‘issuing judicial authority’, within the meaning of Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as not including 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 a European arrest warrant."

The judgment was discussed at the COPEN meeting on 19 June on the basis of 9974/19 (see also the outcome of proceedings of that meeting, 12149/19, point 2). It is recalled that following the judgment, several Member States issued special notes about their view concerning the impact of the judgment for their legal order. These notes were exchanged via the JHA Counsellors, and/or distributed via the Council secretariat, and were made available on the website of the European Judicial Network (EJN). The notes are also set out in the Annex of 9974/19.

Further, Eurojust presented a questionnaire with a compilation of replies about this issue, see 10016/19.

Judgment in case C-489/19 PPU (NJ)

As was foreseen, the judgment of 27 May 2019 called for further clarification, and several references for preliminary rulings were made.

One of the ensuing cases is C-489/19 PPU (NJ). It concerns a request for a preliminary ruling by the Higher Regional Court of Berlin (Germany). The request was made in the context of the execution in Germany of a European arrest warrant issued against NJ by the Public Prosecutor's Office of Vienna (Austria), and endorsed by a decision of the Regional Court of Vienna.

In specific cases, Austrian Public Prosecutor's Offices may be subject to directions or instructions from the executive (Minister of Justice). However, these Offices do not independently issue European arrest warrants, since Austrian law provides for the endorsement of such a warrant by a court prior to issuing the European Arrest Warrant. The endorsement procedure includes an examination of the legality and proportionality of the European arrest warrant concerned and is subject to judicial review.

For those reasons, the Higher Regional Court of Berlin considered that it was possible to take the view that the power to decide whether to issue a European arrest warrant ultimately rests with the court responsible for endorsing it.

In its judgment of 9 October 2019, the CJEU confirmed the line of thinking suggested by the Higher Regional Court of Berlin, and stated as follows:

"The concept of a 'European arrest warrant' referred to in Article 1(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that European arrest warrants 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."

NB: the CJEU based its thinking in this case on Article 1(1) FD EAW, whereas in cases C- 508/18 and C- 82/19 PPU (OG and PI) it had based its thinking on Article 6(1) FD EAW.

Upcoming judgments

To be noted that the more judgments are currently in the pipe-line that aim at clarifying the judgment of 27 May 2019, including in the following cases:

- a) Case C-566/19 PPU and case C-626/19 PPU - Luxembourg and Netherlands' court asking whether the French Public Prosecutor's Office may be regarded as an 'issuing judicial authority';
- b) Case C-625/19 PPU: Netherlands' court asking whether the Swedish Public Prosecutor's Office may be regarded as an 'issuing judicial authority';
- c) Case C-627/19 PPU: Netherlands' court asking whether the Belgium Public Prosecutor's Office may be regarded as an 'issuing judicial authority'.

The advocate general delivered his opinion in these cases on Tuesday 26 November 2019.

In case C-510/19, a Belgian court asked whether the Netherlands' Public Prosecutor service may be regarded as an 'executing judicial authority'.

Case C-128/19 (Dorobantu) - Detention conditions

On 15 October 2019, the CJEU delivered its judgment in case C-128/19 (Dorobantu). The judgment responds to a reference for a preliminary ruling that had been submitted to the CJEU following its judgment of 5 April 2016 in cases C-404/15 and C-659/15 PPU (Aranyosi and Căldăraru).¹

At CATS on 12 November 2019, the Council Legal Service has already discussed this judgment, and has pointed to the implicit 'invitation' by the CJEU in point 71 of the judgment to establish minimum EU standards on detention conditions.

The ruling of the CJEU is as follows:

"Article 1(3) of Framework Decision 2002/584, read in conjunction with Article 4 of the Charter, must be interpreted as meaning that when the executing judicial authority has objective, reliable, specific and properly updated information showing there to be systemic or generalised deficiencies in the conditions of detention in the prisons of the issuing Member State, it must, for the purpose of assessing whether there are substantial grounds for believing that, following the surrender to the issuing Member State of the person subject to a European arrest warrant, that person will run a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter, 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 of the Charter.

¹ Other cases on this line include C-220/18 PPU (ML, judgment of 25 July 2018) and C-216/18 PPU (LM, judgment of 25 July 2018).

As regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the European Court of Human Rights. Although, in calculating that available space, the area occupied by sanitary facilities should not be taken into account, the calculation should include space occupied by furniture. Detainees must, however, still have the possibility of moving around normally within the cell.

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 his 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, because of the conditions of detention prevailing in the prison in which it is actually intended that he will be detained, 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."