



## STREAM Case Note

AZ

24 November 2020

### Abstract

On 24 November 2020, the Grand Chamber of the Court of Justice of the European delivered its judgment in [AZ, Case C-510/19](#), as a result of a request for preliminary ruling made by the Court of Appeal of Brussels (Belgium). The case concerns the execution of an additional EAW against a Belgian citizen who was surrendered from the Netherlands to Belgium, following a previous EAW. This case relates to the concept of “executing judicial authority” in view of Article 6(2) and Article 27(3)(g) of the European Arrest Warrant Framework Decision (EAWFD).

*First*, the Court of Justice found that the concept of “executing judicial authority” within the meaning of Article 6(2) of the EAWFD constitutes an autonomous concept of EU law. That concept covers judges, courts, or other authorities, which participate in the administration of criminal justice in that Member State and act independently from the executive. The judgment sets out that, where the authority executing an EAW is not a court, national procedural rules must provide for judicial remedy against the decision of that authority to execute the EAW.

*Secondly*, the Court found that the public prosecutor who is subject to instructions in specific cases from the executive cannot be classified as an “executing judicial authority” under Article 27(3)(g) of EAWFD and thus, cannot give the consent that the person surrendered be prosecuted for another offence committed prior to surrender in the issuing Member State.

### Keywords:

Concept of “executing judicial authority”; Independence of the “executing judicial authority”; Public prosecutor subject to instructions in specific cases from the executive; Effective judicial protection; Rule of speciality; Consent to prosecute for an offence other than the one for which the person is surrendered.



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## Background

In September 2017, the investigating judge at the Court of First Instance in Leuven (Belgium) issued an EAW against AZ, a Belgian national, for the purpose of conducting criminal prosecution for the offences of forgery of documents, use of forged documents and fraud.<sup>1</sup> On the basis of that EAW, AZ was arrested in the Netherlands and then surrendered to the Belgian authorities.<sup>2</sup>

In January 2018, the same authority that issued the initial EAW, issued an additional EAW against AZ, for the same criminal offences, but for acts other than those to which the initial EAW referred to.<sup>3</sup> In February 2018, the public prosecutor for the Amsterdam district (Netherlands) sent a letter to the issuing judicial authority, giving his consent for prosecution of AZ for the offences referred to in the additional EAW.<sup>4</sup>

AZ was prosecuted for the facts referred to in both the initial and additional EAWs and was convicted to 3 years of imprisonment.<sup>5</sup> He brought an appeal against that decision before the Court of Appeal of Brussels (the referring court), where he raised the issue of compatibility of the consent given by the Dutch public prosecutor with the EAWFD. Therefore, the referring court addressed to the Court of Justice questions on the concept of “executing judicial authority” and whether the public prosecutor for the Amsterdam district falls within that concept, in view of Article 6(2) and Article 27(3)(g) and (4) of EAWFD.<sup>6</sup>

Article 27(2) of the EAWFD stipulates the speciality rule, according to which, a person surrendered may not be prosecuted, sentenced, or otherwise deprived of his (her) liberty in the issuing Member State for an offence committed prior to his (her) surrender and different from the one for which he (she) was surrendered. An exception is made where the executing judicial authority which surrendered that person gives its consent in conformity with paragraphs 3(g) and (4) of the same provision.

This judgment follows-up the Court’s settled case-law ([OG and PI judgment](#)) on the concept of “issuing judicial authority” within the meaning of Article 6(1) of EAWFD. In that regard, the Court has defined it as an autonomous concept of EU law.<sup>7</sup> In addition, the Court has determined the criteria that the authority must fulfil in order to be classified as an “issuing judicial authority”. First, the authority should participate in the administration of criminal justice in the issuing Member State.<sup>8</sup> Secondly, that authority must be capable of exercising its responsibilities while issuing an EAW objectively and independently. Thus, the authority must be able to take the decision to issue an EAW, by considering all incriminatory and exculpatory evidence, and without being subject to external directions or instructions, in particular from the executive body. Especially, regarding the requirement of independence, there must be statutory rules and an institutional framework, which guarantee the issuing judicial authority from the risk of receiving instructions in specific cases from the executive.<sup>9</sup>

The Court of Justice applied the same interpretation and criteria in respect of the concept of “executing judicial authority” within the meaning of Article 6(2) and Article 27(3)(g) and (4) of the EAWFD.

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<sup>1</sup> Judgment of the Court of Justice of the European Union of 24 November 2020, AZ (C-510/19), EU:C:2020:953, paragraph 14.

<sup>2</sup> AZ judgment, paragraph 15.

<sup>3</sup> AZ judgment, paragraph 16.

<sup>4</sup> AZ judgment, paragraph 17.

<sup>5</sup> AZ judgment, paragraph 18.

<sup>6</sup> AZ judgment, paragraphs 19 – 20.

<sup>7</sup> AZ judgment, paragraph 40.

<sup>8</sup> AZ judgment, paragraph 42.

<sup>9</sup> AZ judgment, paragraph 44.

## Summary of the Judgment

The first legal issue in this case is whether the concept of “executing judicial authority” within the meaning of Article 6(2) of EAWFD constitutes an autonomous concept of EU law and the criteria to be applied for determining that concept.<sup>10</sup>

The Court of Justice found that the concept of “executing judicial authority” constitutes an autonomous concept of EU law.<sup>11</sup> According to the Court, that concept covers judges, courts or other authorities, which participate in the administration of justice in that Member State and act independently from the executive. In addition, the Court ruled that, where the authority executing an EAW is not a court, national procedural rules must provide for judicial remedy against the decision of that authority to execute the EAW.<sup>12</sup>

The Court noted that although the issuing and executing judicial authorities exercise separate functions, the status and the nature of those judicial authorities referred to in Article 6(1) and 6(2) of EAWFD are identical.<sup>13</sup> Therefore, the Court applied by analogy the same standards set out in its case law regarding the concept and the criteria of “issuing judicial authority”.

The Court has previously ruled ([OG and PI judgment](#)) that the concept of “issuing judicial authority” within the meaning of Article 6(1) of EAWFD requires an autonomous and uniform interpretation in EU law. While Member States enjoy a certain degree of discretion in the designation of the competent “judicial authority” to issue an EAW, the meaning and scope of that concept cannot be left to their assessment.<sup>14</sup> That concept covers not only judges or courts, but also other authorities, such as public prosecutor’s offices, that participate in the administration of criminal justice and exercise their functions independently.<sup>15</sup>

In the judgment under analysis, the Court recalled that respect for fundamental rights and legal principles to which Article 1(3) of EAWFD refers, requires that the decision on issuing an EAW and on executing the EAW are taken respectively by judicial authorities that meet the requirement of independence, which is inherent in effective judicial protection.<sup>16</sup> This requirement is important because both the decisions on issuing and on executing an EAW impinge on the right to liberty of the person concerned.<sup>17</sup>

In addition, the Court points out the distinction between the procedure for issuing an EAW, which entails a dual level of protection,<sup>18</sup> and the procedure for executing an EAW, in which there is only one level of protection represented by the executing judicial authority<sup>19</sup>. Thus, it follows from the requirement of effective judicial protection that the decision of an authority other than a court to execute an EAW must be capable of being subject to judicial review.<sup>20</sup> In that regard, the Court reminds to Member States their obligation stemming from the EAWFD to implement into their domestic law procedural rules that guarantee the necessary level of protection in the EAW mechanism.<sup>21</sup>

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<sup>10</sup> AZ, paragraph 38.

<sup>11</sup> AZ, paragraph 41.

<sup>12</sup> AZ, paragraphs 54 and 56.

<sup>13</sup> AZ, paragraph 47.

<sup>14</sup> AZ, paragraph 40.

<sup>15</sup> AZ, paragraph 42 – 44.

<sup>16</sup> AZ, paragraph 49.

<sup>17</sup> AZ, paragraph 51.

<sup>18</sup> AZ, paragraph 52. For further analysis on the dual level of protection, refer to the STREAM Case Note on the MM judgment in the Repository, available at <https://stream-eaw.eu/stream-repository/>.

<sup>19</sup> AZ, paragraph 53.

<sup>20</sup> AZ, paragraph 54.

<sup>21</sup> AZ, paragraph 55.

The second legal issue is whether the public prosecutor may qualify as an “executing judicial authority” to give consent that the person surrendered to the issuing Member State be prosecuted by the authorities of that State for another offence committed prior to the surrender, within the meaning of Article 6(2) and Article 27 (3)(g) and (4) of EAWFD.<sup>22</sup>

The Court found that the public prosecutor cannot be classified as an “executing judicial authority” for the purpose of those provisions, if he/she may be subject to instructions in specific cases from the executive.<sup>23</sup>

The Court interpreted that the judicial authority which might give the consent under Article 27 (3)(g) and (4) of EAWFD must satisfy the same criteria of an “executing judicial authority” elaborated above,<sup>24</sup> regardless of whether it is or not the same authority, which decided on the execution of the EAW<sup>25</sup>. The Court noted that, although the consent given under Article 27(4) of EAWFD is different from the decision to execute the EAW, the same provisions of EAWFD concerning the nature of the offence subject to surrender and the same refusal grounds apply.<sup>26</sup> Moreover, since the decision on that consent relates to an offence other than the one for which the person was surrendered, that decision might lead to a heavier sentence for that person, and thus, might affect his/her right to liberty.<sup>27</sup>

Accordingly, the Court concluded that, the public prosecutor for the Amsterdam district who based on the national law may be subject to instructions in specific cases from the Ministry of Justice, does not meet the necessary requirements of an “executing judicial authority” for the purpose of giving consent under Article 27(3)(g) and (4) of EAWFD.<sup>28</sup> The Court did not take into account the fact that the person surrendered could bring an action before a judge against the decision of the public prosecutor to give consent under those provisions,<sup>29</sup> since such judicial review did not prevent the public prosecutor from receiving instructions from the executive in his decision-making<sup>30</sup>.

## Analysis

First, following this judgment, Member States must assure that the competent authorities they designate for the execution of EAWs, satisfy two criteria, (1) they participate in the administration of justice in that Member State, and (2) they act independently from the executive body. In respect of the latter, Member States have the obligation to implement statutory rules and an institutional framework that ensure the independence of the executing judicial authority and do not expose that authority to the risk of being subject to instructions in specific cases from the executive.

Apart from that, Member States have the responsibility to adopt national procedural rules which afford to the requested person the possibility of a judicial remedy, *i.e.* to challenge before a court the decision on executing an EAW taken by an authority other than a court. The existence of such judicial remedy is not a criterion for that authority to be classified as “executing judicial authority”, but rather it is a condition for the procedure of execution of the EAW to meet the requirement of effective judicial protection.

Secondly, the same criteria of “executing judicial authority” must be satisfied by the authority which gives the consent that the person surrendered be prosecuted, sentenced, or otherwise deprived of

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<sup>22</sup> AZ, paragraph 57.

<sup>23</sup> AZ, paragraph 70.

<sup>24</sup> AZ, paragraphs 58 – 59.

<sup>25</sup> AZ, paragraph 64.

<sup>26</sup> AZ, paragraph 61.

<sup>27</sup> AZ, paragraph 62.

<sup>28</sup> AZ, paragraph 67.

<sup>29</sup> AZ, paragraph 68.

<sup>30</sup> AZ, paragraph 69.

his(her) liberty in the issuing Member State, for an offence committed prior to his(her) surrender and different from the one for which he(she) was surrendered. Therefore, Member States should take into account these criteria in the designation of the competent authorities under Article 27(3)(g) of EAWFD.

It can be inferred from the Court's ruling that, under the EAWFD, it is not mandatory that the authority, which decides on the execution of the EAW, is the same the authority which might give the consent for an exception from the rule of speciality to be applied. However, the latter is required, according to the Court, to be independent, in particular from the executive, and to act independently while deciding to give the consent in compliance with Article 27(4) of EAWFD.