



STREAM Case Note

MM

13 January 2021

Abstract

On 13 January 2021, the Court of Justice of the European Union (Third Chamber) delivered its judgment in [MM, Case C-414/20 PPU](#), pursuant to a request for preliminary ruling made by the Specialised Criminal Court of Bulgaria.

The Court of Justice found that, while the classification of an authority other than a court as an “issuing judicial authority” requires that authority to participate in the administration of justice and act independently from the executive, it is not dependent on there being review by a court of the European Arrest Warrant (EAW) and of the national decision upon which the EAW was based.

The Court clarified that judicial review is not related to the status of “issuing judicial authority”, but to effective judicial review. In that regard, the Court found that, the court of the issuing Member State which is called upon to review the pre-trial detention of the person surrendered based on an EAW, has jurisdiction to review indirectly the validity of that EAW being challenged before it, where the law of the issuing Member State does not provide for a separate legal remedy against that EAW.

In addition, the judgment sets out that the concept of a “[national] arrest warrant or any other enforceable judicial decision having the same effect” within the meaning of Article 8(1)(c) of the European Arrest Warrant Framework Decision (EAWFD). Such concept covers only national measures adopted by a judicial authority which are intended to search for and arrest the person subject of a criminal prosecution, for the purpose of bringing that person before a court to conduct criminal proceedings. The Court ruled that an EAW which is not based on a national measure having such legal effect must be regarded as invalid. However, the Court interpreted that the national court which finds the EAW being invalid for this reason is not required under EU law to decide on the release of the person concerned. Rather, the court shall review the conditions for pre-trial detention based on national law.

Keywords:

Concept of “issuing judicial authority”; Effective judicial protection; National arrest warrant; Any other enforceable judicial decision having the same effect; Validity of the EAW; Judicial review of the EAW; Access to judicial remedies post surrender; Pre-trial detention.



Background

This case concerns an EAW issued by the Bulgarian public prosecutor against MM, who challenged the validity of that EAW during the review of his pre-trial detention after being surrendered from Spain to Bulgaria. The EAW was issued on the basis of a decision to put MM under investigation for having participated in a criminal drug-trafficking organisation; that decision was intended to notify him of the charges against him, but did not have the legal effect of placing him in detention.¹ In addition, both the national measure of putting MM under investigation which served as the basis for issuing the EAW and the decision to issue the EAW, were adopted by the public prosecutor alone. The concern was that the national law did not provide for any judicial remedy neither against the EAW nor against the national measure upon which the EAW was based.²

The present judgment follows-up on recent decisions taken by the Court in respect of the concept of “issuing judicial authority” ([OG and PI](#)) and effective judicial protection ([JR and YC](#)).

In the present judgment, it was not disputed the fact that the public prosecutor in Bulgaria issuing the EAW satisfied the two criteria of “issuing judicial authority” set out by the Court in the [OG and PI judgment](#), namely its participation in the administration of criminal justice and its independence while issuing the EAW.³ However, the Court referred to the [OG and PI judgment](#) to distinguish the concept of “issuing judicial authority” from that of “effective judicial protection”.

To decide on the matter concerning the lack of judicial review against the EAW and the national measure, the Court recalled that the EAW system entails a dual level of protection of procedural and fundamental rights for the requested person ([JR and YC](#)). A first level, at which a national arrest warrant is adopted, and a second level, at which the EAW is issued.⁴ At least at one of the two levels, a decision which meets the requirements of effective judicial protection is required to be adopted, because the decision to issue an EAW is capable of impinging on the fundamental right to liberty of the person concerned.⁵

With specific regard to the second level of protection, the Court has elaborated two further requirements. *First*, the issuing judicial authority must observe the conditions to be met for issuing a EAW and its proportionality, by taking into account all incriminatory and exculpatory evidence and without being subject to external instructions, in particular from the executive.⁶ *Secondly*, where the decision to issue a EAW is taken by an authority which participates in the administration of justice and is independent from the executive, but is not a court, that decision and its proportionality must be capable of being subject to judicial review by a court in the issuing Member State.⁷ The Court has stated that the requirement of effective judicial protection may be satisfied either through the right of appeal against the decision to issue the EAW⁸, or through review by a court of that decision before, after, or at the same time as its adoption.⁹

Summary of the Judgment

The first legal issue is whether the concept of “issuing judicial authority” under Article 6(1) of the EAW FD requires as a condition that the decision to issue the

¹ Judgment of the Court of Justice of the European Union of 13 January 2021, *MM* (C-414/20 PPU) EU:C:2021:4, paragraphs 23 and 24.

² *MM*, paragraph 42

³ *MM*, paragraph 43

⁴ *MM*, paragraph 62.

See also, Judgment of the Court of Justice of the European Union of 12 December 2019, *JR and YC*, C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, paragraph 59.

⁵ *MM*, paragraph 63; *JR and YC* judgement, paragraph 60.

⁶ *MM*, paragraph 64; *JR and YC* judgement, paragraph 61.

⁷ *MM*, paragraphs 65 – 66; *JR and YC*, paragraphs 62 – 63.

⁸ *MM*, paragraph 68; *JR and YC*, paragraph 65.

⁹ *MM*, paragraph 69; *JR and YC*, paragraphs 70 – 71.

EAW and the national decision upon which that warrant was based be reviewed by a court.¹⁰ The Court found that such judicial review does not represent a requirement for an authority to have the status of “issuing judicial authority”.¹¹

In respect of this issue, the Court made a distinction between the concept of “issuing judicial authority” within the meaning of Article 6(1) FD EAW, and that of effective judicial protection.¹²

In the [OG and PI judgment](#), the Court determined two criteria that the authority must satisfy to be qualified as “issuing judicial authority”; it participates in the administration of criminal justice in the issuing Member State and acts independently while performing its responsibilities to issue an EAW.¹³ In addition, the Court stated in that judgment, that the independence of the “issuing judicial authority” requires the existence of statutory rules and an institutional framework which guarantee that authority from being subject to instructions from the executive in a specific case, when issuing an EAW.¹⁴ In the judgment under analysis, the Court clarified that judicial review of the EAW and of the national decision upon which the EAW was based does not fall within the scope of these statutory rules and institutional framework.¹⁵ Thus, such judicial review is not a criterion for the authority to be classified as “issuing judicial authority”.

Instead, according to the Court, judicial review is related to effective judicial protection and the dual level of protection, in view of the procedure for issuing the EAW, as elaborated in the previous case-law of the Court.¹⁶ It links to the other legal issue before the Court of Justice, on whether the national court which is called upon to review the pre-trial detention of the requested person after being surrendered in the issuing Member State, has jurisdiction to examine the validity of the EAW, where the national legislation does not provide for a separate judicial review of that EAW.¹⁷ The Court of Justice answered this question in the affirmative,¹⁸ in the light of the right to effective judicial protection enshrined in Article 47 of the [Charter of Fundamental Rights](#) (the Charter).

The Court reaffirmed that it is primarily the obligation of Member States to introduce in the national legal system procedural rules which guarantee this level of judicial protection, which is in fact required by the EAWFD.¹⁹ The Court has also interpreted that, under Article 51(1) of the Charter, the courts of Member States are obliged to ensure compliance with the Charter when they are implementing EU law, namely while acting as an issuing or executing judicial authority in the application of national legislation adopted to transpose the EAWFD.²⁰

Therefore, a court which is called upon to give a ruling at a stage in the criminal proceedings following the surrender of the requested person must be able to carry out an indirect review of the validity of the EAW being challenged before it, where the procedural law of the issuing Member State does not provide for a separate legal remedy against that EAW.²¹

Another legal issue referred to the Court of Justice in this case was the interpretation of the expression used in Article 8(1)(c) of EAWFD, which requires the EAW to provide information on “*an arrest warrant or any other enforceable judicial decision having the same effect*”.

¹⁰ *MM*, paragraph 41.

¹¹ *MM*, paragraph 46.

¹² *MM*, paragraph 44.

¹³ Judgment of the Court of Justice of the European Union of 27 May 2019, *OG and PI*, C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraphs 51 and 74.

¹⁴ *OG and PI*, paragraph 74.

¹⁵ *MM*, paragraph 44.

¹⁶ *MM*, paragraph 44.

¹⁷ *MM*, paragraph 58.

¹⁸ *MM*, paragraph 74.

¹⁹ *MM*, paragraph 67.

²⁰ *MM*, paragraph 71.

²¹ *MM*, paragraph 72.

The Court recalled that this concept refers to a national measure distinct from the EAW decision,²² and the term “*judicial decision*” includes all the decisions taken by Member State’s authorities that administer criminal justice.²³ The Court explains further that such concept covers only national coercive measures that are intended to enable the arrest of requested persons and their appearance before a court to conduct criminal proceedings against them.²⁴ The Court explained that the national measure on which the EAW is based should produce equivalent legal effects of an “*arrest warrant*”, meaning that of an order to search for and arrest the requested person, regardless of whether the national measure is called or not “*arrest warrant*” in the legislation of the issuing Member State.²⁵

The Court stated that on the contrary, national measures which does not produce such legal effects of searching for and arresting the requested person, do not fall within the concept of Article 8(1)(c) of EAWFD. This would be, for example, national measures which are intended to initiate criminal proceedings, to notify the person concerned of the charges and to afford that person the possibility to defend him or herself, to provide explanations or to present evidence.²⁶ The Court ruled that the EAW which is not based on a national measure that has the legal effect of searching for and arresting the requested person must be regarded as invalid.²⁷

The last legal issue in this case was whether a finding by a national court of the issuing Member State that the EAW is invalid would lead to the release from pre-trial detention of the requested person who was arrested and surrendered based on that EAW.²⁸ The Court ruled that where the national court finds that the EAW is invalid because it has been issued in violation of Article 8(1)(c) of FD EAW as interpreted above, the court is not required under the EAWfd and Article 47 of the Charter to decide on the release of the person concerned.²⁹ The Court argued that, in principle, the EAW has exhausted its legal effects once the requested person has been arrested and then surrendered to the issuing Member State. Furthermore, the EAW is not an order for the detention of the requested person in the issuing Member State.³⁰ In addition, the Court noted the lack of harmonised EU rules for the application of pre-trial detention in criminal proceedings.

According to the Court, it is for the competent national court to assess on the basis of the national law whether the conditions for the pre-trial detention of the requested person surrendered to the issuing Member State on the basis of an invalid EAW are met.³¹

Analysis

First, in the judgment under analysis the Court clearly distinguished the concept of “issuing judicial authority”, from that of effective judicial protection in the state of issuing the EAW. Consequently, an authority can be qualified as an “issuing judicial authority”, regardless of whether its decision to issue the EAW can be reviewed by a court or not.

Secondly, a court of the issuing Member State which is called upon to give a ruling at a stage in the criminal proceedings following the surrender of the requested person, must ensure that the right of effective judicial protection enshrined in Article 47 of the Charter is respected. For this purpose, that court must be able to review the validity of the EAW being challenged before it, where a separate judicial

²² *MM*, paragraph 51.

²³ *MM*, paragraph 52.

²⁴ *MM*, paragraph 53.

²⁵ *MM*, paragraph 53.

²⁶ *MM*, paragraph 53.

²⁷ *MM*, paragraph 57.

²⁸ *MM*, paragraph 75.

²⁹ *MM*, paragraph 82.

³⁰ *MM*, paragraph 77.

³¹ *MM*, paragraph 79 and 81.

review of the conditions for issuing the EAW and its proportionality is not provided for by the national procedural law.

The Court reiterated the importance of effective judicial protection in the EAW mechanism. In view of that fundamental right being enshrined in Article 47 of the Charter, the Court emphasized that the obligations of Member States stemming from the EAWFD include ensuring that their legal orders provide for the required level of judicial protection, which meets the criteria elaborated in the Court's case-law.³²

The judgment thus reinstates the essential role of national courts to guarantee compliance with fundamental rights enshrined in the Charter, while they are implementing EU law, and thus, when applying the EAWFD.³³ This requires competent national courts to assure that judicial review of the decisions relating to the EAW is carried out, either directly or indirectly, even when it is not explicitly contemplated in the national law.³⁴

However, in the judgment under analysis, the Court did not determine whether the Bulgarian procedure, which provided only for an *ex-post* judicial review of the EAW issued by the prosecutor during the pre-trial criminal proceedings, satisfied the requirements of effective judicial protection. This issue was addressed by the Court in a later decision, in the [PI judgment](#).³⁵

Third, the Court of Justice recalled that the principles of mutual trust and mutual recognition require that the EAW is valid and has been issued in conformity with the EAWFD, including the requirement of the EAW being based on a “[national] arrest warrant or any other enforceable judicial decision having the same effect”.³⁶ The Court clarified that this concept depends on the legal effect of the national measure, where it is intended to search for and arrest the requested person, and not on the terminology used by the national law.³⁷

Fourth, with regard to the conditions for pre-trial detention following the arrest and surrender of the person on the basis of an EAW, the Court leaves the national court to refer to the relevant national legislation.³⁸ The Court in fact interpreted that EU law, namely the EAWFD and Article 47 of the Charter, do not require the national court to decide on the release of the person subject to pre-trial detention, when it finds that the EAW is invalid.³⁹

³² *MM*, paragraphs 67 and 70.

³³ *MM*, paragraph 71.

³⁴ *MM*, paragraphs 71 – 72.

³⁵ For further analysis on the *PI* judgment, see the *STREAM* case note in the Repository, available at: <https://stream-eaw.eu/stream-repository/>.

³⁶ *MM*, paragraph 49.

³⁷ *MM*, paragraphs 53 and 57.

³⁸ *MM*, paragraph 81.

³⁹ *MM* 4, paragraph 82.