



# Reports of Cases

OPINION OF ADVOCATE GENERAL  
SZPUNAR  
delivered on 16 May 2018<sup>1</sup>

**Case C-268/17**

**Ured za suzbijanje korupcije i organiziranog kriminaliteta**  
**v**  
**AY**

(Request for a preliminary ruling from the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia))

(Reference for a preliminary ruling — Judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — Articles 3(2) and 4(3) — European arrest warrant — Grounds for non-execution — Concept of final judgment in respect of the same acts — Requested person — Witness status in the executing Member State)

1. The present request for a preliminary ruling by the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia) will give the Court the opportunity to clarify that, as a matter of principle, it lacks jurisdiction when it comes to interpreting provisions on the non-execution of a European Arrest Warrant (EAW), where the questions emanate from a court of the Member State which has issued the said EAW in conformity with Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ('the Framework Decision').<sup>2</sup>

## Legal framework

2. Article 1 of the Framework Decision, headed 'Definition of the European arrest warrant and obligation to execute it', reads as follows:

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

<sup>1</sup> Original language: English.

<sup>2</sup> OJ 2002 L 190, p. 1.

3. Article 2, headed 'Scope of the European arrest warrant', stipulates in its paragraphs 1 and 2:

'1. A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

2. The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant:

...

– corruption,

...'

4. 'Grounds for mandatory non-execution of the European arrest warrant' are listed in Article 3 of the abovementioned framework decision, pursuant to which:

'The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:

...

2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

...'

5. Under Article 4 of the framework decision, headed 'Grounds for optional non-execution of the European arrest warrant':

'The executing judicial authority may refuse to execute the European arrest warrant:

...

3. where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;

...'

## Facts, procedure and questions referred

6. AY is a Hungarian national, the chairman of a Hungarian company, against whom criminal proceedings have been brought before the referring court. In the indictment issued by the Ured za suzbijanje korupcije i organiziranog kriminaliteta (Office for Suppression of Corruption and Organised Crime, 'USKOK'), on 31 March 2014, AY is alleged to have agreed to pay a considerable amount of money to the holder of a high office in Croatia, in return for the conclusion of an agreement between the Hungarian company and the Croatian Government.

7. On 10 June 2011 USKOK opened an investigation against AY as a suspect of acts of active corruption, fully informing the Hungarian Public Prosecutor's Office and the Hungarian Attorney General in person before the investigation was opened. On the adoption of the decision to open an investigation, the Hungarian competent authority was requested to provide international legal assistance by interviewing AY as a suspect and delivering a summons to him. Letters rogatory were sent between 10 June 2011 and September 2013.

8. The Hungarian authorities did not execute the letters rogatory. The competent Croatian authorities therefore found it impossible to make contact with the suspect AY and the Croatian investigation against the suspect AY was suspended in December 2012.

9. Nevertheless, on the basis of information communicated to him in the annex to the letter rogatory, the Hungarian Attorney General opened an investigation as there were reasonable grounds to suspect that a criminal offence prejudicing the integrity of public life in the form of active corruption at international level under the Hungarian Criminal Code had been committed. That investigation was closed on 20 January 2012 by a decision of the Hungarian National Bureau of Investigation pursuant to the Hungarian Law on criminal procedure, on the ground that the acts committed did not constitute a criminal offence. However, that investigation had not been opened against AY as a suspect, but only in connection with the alleged criminal offence. AY was, in this connection, interviewed as a witness. The holder of high office in Croatia was not interviewed as a witness in that investigation procedure.

10. According to the referring court, other proceedings conducted in Hungary were closed in the absence of new facts subsequent to those mentioned in the decision of 20 January 2012.

11. On 1 October 2013, after the Republic of Croatia's accession to the European Union and before criminal proceedings were initiated in Croatia in accordance with the applicable national provisions, USKOK issued an EAW against AY.

12. The execution of that EAW was refused by decision of the Fővárosi Törvényszék (Budapest High Court, Hungary) of 7 October 2013 on the ground that the available information showed that criminal proceedings had already been brought in Hungary in respect of the same acts as those on which the arrest warrant was based, which the Hungarian judicial authority had halted.

13. Following the proposal to refer the case to a trial bench and the decision to refer the case of AY to the referring court, the case was assigned to the Indictment Division of that court, European arrest warrants Section, in accordance with the relevant provision of the Croatian Criminal Procedure Code. A second EAW against AY, the requested person, was issued on 15 December 2015. That warrant was never executed by Hungary.

14. On 27 January 2017 the second EAW was again submitted to the competent Hungarian authorities by the referring court.

15. Subsequently, on the expiry of 60 days following that last submission of the second EAW, the referring court approached the Croatian member of Eurojust. After intervening, the Croatian member of Eurojust forwarded to the referring court the opinion of the Hungarian competent authority, stating that it considers that it is not obliged to act on the EAW that has been issued, and that it is not legally possible in Hungary to arrest the accused AY or to initiate a new procedure for the execution of the EAW issued in Croatia on 15 December 2015. An identical opinion of the Hungarian competent judicial authority was forwarded to the referring court on 4 April 2017.

16. Given that the referring court entertains doubts as to the interpretation of the grounds for refusal to execute the EAW laid down in Articles 3(2) and 4(3) of the Framework Decision, by order of 16 May 2017, received at the Court on 18 May 2017, it referred the following questions for a preliminary ruling:

- ‘(1) Is Article 4(3) of the Framework Decision to be interpreted as meaning that the decision not to prosecute for an offence on which a European arrest warrant is based or to halt proceedings relates only to the offence on which the European arrest warrant is based or is that provision to be understood as meaning that the cessation or discontinuation of proceedings must also concern the requested person as the suspect/accused in those proceedings?
- (2) May a Member State refuse, pursuant to Article 4(3) of the Framework Decision, to execute a European arrest warrant which has been issued when the judicial authority of the other Member State has decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings where the requested person had the status of a witness and not of a suspect/accused in the proceedings?
- (3) Does the decision to terminate an investigation in which the requested person did not have the status of a suspect but was interviewed as a witness constitute, for the other Member States, a ground not to act on the European arrest warrant which has been issued in accordance with Article 3(2) of the Framework Decision?
- (4) What is the link between the mandatory ground for refusal of surrender laid down in Article 3(2) of the Framework Decision, where ‘the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts’, and the optional ground for refusal of surrender laid down in Article 4(3) of the Framework Decision, where ‘a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings’?
- (5) Is Article 1(2) of the Framework Decision to be interpreted as meaning that the executing State is required to adopt a decision on any European arrest warrant communicated to it, even where it has already taken a decision on a previous European arrest warrant issued by the other judicial authority against the same requested person in the same criminal proceedings and where the new European arrest warrant is issued because of a change in circumstances in the State issuing the European arrest warrant (decision to refer — initiation of criminal proceedings, stricter evidential criteria relating to the commission of the offence, new competent judicial authority/court)?’

17. In the light of its specific circumstances, this case has been given priority, pursuant to Article 53(3) of the Rules of Procedure of the Court of Justice.

18. Written observations were submitted by the parties in the main proceedings, the Croatian, Czech, Hungarian, Austrian, and Romanian Governments, and Ireland, as well as by the Commission. The parties in the main proceedings, the Croatian and Hungarian Governments and the Commission took part at the hearing, which was held on 28 February 2018.

## Assessment

### *Jurisdiction of the Court of Justice*

19. In the case at issue the court of the Member State *issuing* the EAW seeks clarification on the *execution* of that EAW. In this connection, the referring court poses a range of questions on grounds for refusal to execute an EAW provided for in Articles 3(2) and 4(3) of the Framework Decision.

20. This appears odd, as the answer provided by the Court would only concern the executing authorities.

21. Cases on the EAW typically arise out of a dispute between the judicial authorities of two Member States. The authorities of one Member State issue an EAW, while the judicial authorities of another Member State execute this EAW.

22. As a consequence, typically, cases relating to questions on execution and, more particularly, on possible grounds of refusal of execution emanate from the executing judicial authorities, as these authorities seek clarity as to the parameters of such grounds of refusal.<sup>3</sup> These authorities seek to ascertain whether they may or must not execute an EAW.

23. It appears that the referring court believes that on the basis of the Court's reply it may find itself in a position where it would withdraw the EAW. If, thus, the Court found there to be grounds of refusal to execute the EAW on the part of the Hungarian authorities, the referring court would ensure that the EAW is withdrawn.

24. I do not think that the Court is in a position to answer Questions 1 to 4 referred for a preliminary ruling. In my view the Court lacks jurisdiction to do so.<sup>4</sup>

25. It is apparent from Article 267(2) TFEU that the Court of Justice has jurisdiction to give a preliminary ruling where a decision on a question referred is considered by the referring court to be 'necessary' to enable it to give judgment.

26. In a case such as the one at issue I very much fail to see the necessity of the Court's reply for the procedure before the referring court. It is true that, as a rule, references for a preliminary ruling are admissible and it is only in rare and extreme cases that the Court refuses to give an answer to them. Such references enjoy a presumption of relevance.<sup>5</sup> This question of the relevance of a question is an objective one.

27. In what the Court itself describes as 'exceptional circumstances'<sup>6</sup> the Court has thus declined to answer questions in hypothetical cases, when the questions raised were not relevant to the resolution of the dispute, where the questions were not articulated sufficiently clearly or where the facts were insufficiently clear.

3 See, by way of example, judgments of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683); of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:198); of 24 May 2016, *Dworzecki* (C-108/16 PPU, EU:C:2016:346); and of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628).

4 I am well aware of the legal distinction between jurisdiction and admissibility, even though its practical importance may be limited, and, in this respect, I fully agree with the overview given by Advocate General Wahl in his Opinion in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, points 16 to 25). On this distinction, see also my Opinion in *Rendón Marín and CS* (C-165/14 and C-304/14, EU:C:2016:75, point 48), and Naômé, C., *Le renvoi préjudiciel en droit européen — Guide pratique* (2<sup>nd</sup> edition), Larcier, Brussels, 2010, pp. 85 and 86.

5 See, by way of example, judgment of 17 April 2018, *Krüsemann and Others* (C-195/17, C-197/17 to C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, C-278/17 to C-286/17 and C-290/17 to C-292/17, EU:C:2018:258, paragraph 24 and the case-law cited).

6 See, by way of example, judgment of 5 June 1997, *Celestini* (C-105/94, EU:C:1997:277, paragraph 22).



28. Questions 1 to 4, at first sight, do not appear to fall within any of the categories of cases where the Court has declined to answer questions. And yet, to my knowledge, the Court has not so far been faced with a situation such as that of the present case, namely where the authorities of a Member State issuing an EAW seek to be enlightened on the rights and obligations of those who are to execute the EAW.

29. The question of whether or not an authority issuing the EAW decides to maintain an EAW is and should be independent from the question of possible grounds for non-execution. If, say, the Court were to hold that the Hungarian authorities *can* rely on Articles 3(2) or 4(3) of the Framework Decision in order not to execute the EAW, legally this has no effect on whether the EAW is maintained by the issuing authority or not. The referring court could maintain the EAW or it could withdraw it.

30. The case underlying this reference for a preliminary ruling is about the interpretation, in a concrete case, of provisions of Hungarian law in the light of provisions of the Framework Decision. The final decision on whether or not the requirements of Articles 3(2) or 4(3) of the Framework Decision are fulfilled is one for the Hungarian authorities to take. The referring court cannot fulfil this task and, effectively, substitute itself for the Hungarian authorities.

31. If the Court were to answer Questions 1 to 4 in the present case, its decision would, of course, not be 'purely advisory without any binding effects'.<sup>7</sup> However, in actual fact and regarding the referring court in the specific case at issue, it would be precisely this: no doubt interesting on paper, but not capable of being applied in practice to the concrete case at issue by the Croatian authorities. The decision could only be relevant to the Hungarian authorities — who are not at the origin of this request for a preliminary ruling.

32. Moreover, it should not be forgotten that the whole system underpinning the EAW is based on mutual trust and recognition between the Member States of issue and of execution. It goes without saying that it is, first and foremost, for the executing Member State to trust the actions of the issuing Member State. However, the issuing Member State must also trust the actions of the executing Member State when the latter relies on grounds of refusal of execution of an EAW. Once the issuing Member State begins to apply and interpret the law of the executing Member State and attempts to ascertain whether the latter has correctly applied the law, it moves dangerously close to a breach of that mutual trust. In this connection, contrary to, for instance, matters of civil law, it is not common for the authorities of one country to apply, interpret and evaluate the law of another country. In the mechanism established by the preliminary ruling procedure, national courts supply the facts and the description of the national law at issue in order to enable the Court to provide a useful and purposive interpretation of EU law. This can, however, only be guaranteed if the referring court is actually in a position to then apply the Court's interpretation to its case at issue. Since the Croatian court cannot apply Hungarian criminal law, the Court's reply will be devoid of purpose in this context.<sup>8</sup>

33. In conclusion, given that the questions referred concern the interpretation of the Framework Decision in the context of issues belonging to the competence of the authorities of the executing Member State, I believe that the Court lacks jurisdiction to answer the questions referred.

<sup>7</sup> This is the terminology employed by the Court in order to distinguish the procedure provided for by Article 267 TFEU in Opinion 1/91 (*First Opinion on the EEA Agreement*) of 14 December 1991 (EU:C:1991:490, paragraph 61).

<sup>8</sup> And it is here that there is the crucial difference to situations where national courts apply foreign law, as is the case in civil law, as a result of conflict rules of private international law. In such a case, the referring court will always hand down a judgment, even if it applies foreign law. This is not the case here.

34. As for Question 5, there does not appear to me to be a problem with jurisdiction. Under the Framework Decision, which is underpinned by the spirit of cooperation between the authorities of several Member States, the reply given to this question is first and foremost of relevance to the authorities of the Member State of execution. Nevertheless, a decision on this question, by which the referring court in essence seeks to ascertain whether by virtue of Article 1(2) of the Framework Decision the executing judicial authority is required to adopt a decision on an EAW transmitted to it, is also necessary for the referring court, if it is to know whether it can legally expect a response from the executing judicial authority. This will enable the referring court to establish whether it should withdraw the second EAW or not. Moreover, it should be borne in mind that Question 5 is the only one which does not require any interpretation of Hungarian law by the Croatian referring court.

### *Substance*

#### *Question 5*

35. By its fifth question, the referring court in essence seeks to ascertain whether by virtue of Article 1(2) of the Framework Decision the executing judicial authority is required to adopt a decision on an EAW transmitted to it, even where, in that Member State, a previous EAW has already been decided on concerning the same requested person, in the same criminal proceedings, where the second EAW has been issued by another judicial authority because of a change of circumstances in the issuing Member State.

36. Pursuant to the clear wording of Article 1(2) of the Framework Decision, Member States are to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that Framework Decision. In this context, Article 15(1) of the Framework Decision provides that the executing judicial authority is to decide within the time limits defined in the Framework Decision on the surrender of the requested person. Moreover, Article 17(1) of the Framework Decision provides that an EAW is to be processed and executed as a matter of urgency and that reasons must be given for any refusal to execute it, in accordance with paragraph 6 of that article. Furthermore, Article 22 of the Framework Decision provides that the executing judicial authority is to immediately notify the issuing judicial authority of the decision on the action to be taken on the EAW.

37. In addition, as shall be seen in more detail below, the grounds of non-execution of an EAW are exhaustively listed in Article 3 et seq. of the Framework Decision. The existence of a previous EAW does not figure among the grounds of refusal.

38. As a consequence, the authorities of an executing Member State which do not reply to an EAW are in breach of their obligations under the Framework Decision.

39. My proposed reply to Question 5 is, therefore, that by virtue of Article 1(2) of the Framework Decision the executing judicial authority is required to adopt a decision on an EAW transmitted to it, even where, in that Member State, a previous EAW has already been decided on concerning the same requested person, in the same criminal proceedings, but the second EAW is issued by another judicial authority because of a change of circumstances in the issuing Member State.

#### *Questions 1 to 4*

40. For the eventuality that the Court should not share my analysis on jurisdiction concerning Questions 1 to 4, on a hypothetical basis, I shall now address the remaining questions referred.

41. By its first to fourth questions, which ought to be considered jointly, the referring court in essence asks whether a decision such as that of 20 January 2012 of the Hungarian Central Bureau of Investigations to discontinue the investigation conducted in Hungary is capable of constituting a ground for refusal within the meaning of Articles 3(2) or 4(3) of the Framework Decision, which would preclude the execution of the EAW issued against AY. It also wonders about the relationship between these two provisions.

*Relationship between Articles 3(2) and 4(3) in the context of the Framework Decision*

42. The basic features of the Framework Decision when it comes to grounds of non-execution of an EAW are well known to the Court already: the Framework Decision is based on the principle of mutual recognition, which itself, as a ‘cornerstone’ of judicial cooperation is based on the mutual trust<sup>9</sup> between Member States with a view to achieving the objective set for the Union to become an area of freedom, security and justice.<sup>10</sup> To that end, Article 1(2) of the Framework Decision lays down the rule that Member States are required to execute any EAW on the basis of the principle of mutual recognition and in accordance with the provisions of that framework decision. Except in exceptional circumstances, the executing judicial authorities may therefore refuse to execute such a warrant only in the exhaustively listed cases of non-execution provided for by the Framework Decision and the execution of the EAW may be made subject only to one of the conditions listed exhaustively therein. Accordingly, while the execution of the EAW constitutes the rule, a refusal to execute is intended to be an exception which must be interpreted strictly.<sup>11</sup>

43. Article 3 of the Framework Decision provides for grounds for mandatory non-execution of the EAW, while Article 4 of the Framework Decision lists grounds for optional non-execution of the EAW.

44. In order to ascertain whether, in the case at issue, the Hungarian authorities could refuse to execute the EAW, I shall first address the mandatory non-execution grounds, before passing to the optional grounds.

*On Article 3(2) of the Framework Decision*

45. Pursuant to Article 3(2) of the Framework Decision, the executing judicial authority is to refuse to execute the EAW if it is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, when there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.

46. The question is now whether *in casu* the person in question has been ‘finally judged’ within the meaning of Article 3(2) of the Framework Decision, and whether the decision of 20 January 2012 of the Hungarian Central Bureau of Investigations, terminating an investigation in which the person subsequently sought by an EAW was questioned only as a witness, constitutes such a final judgment.

<sup>9</sup> It appears that the English language versions of the Court’s cases sometimes refer to ‘mutual confidence’ instead of ‘mutual trust’. I understand that these terms have exactly the same meaning and can be used in an interchangeable manner.

<sup>10</sup> See, by way of example, judgment of 10 August 2017, *Tupikas* (C-270/17 PPU, EU:C:2017:628, paragraph 49).

<sup>11</sup> See judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 19 and the case-law cited).



47. Article 3(2) of the Framework Decision is a manifestation of the *ne bis in idem* principle, according to which a person cannot be sentenced or prosecuted twice in respect of the same act.<sup>12</sup> This principle, which in common law jurisdictions, is referred to as the ‘double jeopardy rule’,<sup>13</sup> is, as regards the EU legal order, now defined in Article 50 of the Charter of Fundamental Rights of the European Union which provides that ‘no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law’.<sup>14</sup>

48. While AY and the Hungarian Government consider that decision to constitute a ‘final judgment’ within the meaning of Article 3(2) of the Framework Decision, all the other parties to the proceedings consider this not to be the case.

49. The wording of the provision does not offer unambiguous guidance. While at least one language version of Article 3(2) of the Framework Decision explicitly specifies that the requested person must have been finally *convicted* in a judgment with the force of *res judicata*,<sup>15</sup> in the vast majority of language versions, the situation is not as clear.

50. The Court’s case-law to date does not appear to offer a clear-cut answer to the question at issue.

51. In *Mantello*,<sup>16</sup> the Court opted for a rather broad interpretation of Article 3(2) of the Framework Decision. The Court essentially transposed its case-law stemming from Article 54 of the Schengen Implementation Convention and held that a requested person is considered to have been finally judged in respect of the same acts within the meaning of Article 3(2) of the Framework Decision where, following criminal proceedings, further prosecution is definitely barred or where the judicial authorities of a Member State have adopted a decision by which the accused is finally acquitted in respect of the alleged acts.

52. At the same time, the Court stated that whether a person had been ‘finally’ judged for the purposes of Article 3(2) of the Framework Decision was determined by the law of the Member State in which the judgment was delivered.<sup>17</sup>

53. AY only had the status of a witness in the Hungarian investigation. He was not an accused. In my view, in order to be ‘finally judged’, an individual must have been at a certain stage in the proceedings an accused. In other words, as is also rightly stressed by the Commission, for a situation to fall under Article 3(2) of the Framework Decision, proceedings must have been brought *against* the same person.

54. Moreover, it can be inferred from *Turanský* that the *ne bis in idem* principle does not fall to be applied to a decision by which an authority of a Member State, after examining the merits of the case before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, *definitely bar further prosecution* and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.<sup>18</sup>

12 See Klimek, L., *European Arrest Warrant*, Springer, Heidelberg et al., 2015, p. 152.

13 By way of example, it is referred to in this way in the context of Article 3(2) of the Framework Decision by Peers, S., *EU Justice and Home Affairs Law, Volume II: EU Criminal Law, Policing and Civil Law*, 4<sup>th</sup> ed., OUP, Oxford, 2016, at p. 89.

14 This principle is, moreover, reflected in Europe in a number of other legal instruments: Protocol No 7 to the ECHR, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders and the Council of Europe European Convention on Extradition of 13 December 1957.

15 See, by way of example, the German language version (‘rechtskräftig verurteilt’).

16 Judgment of 16 November 2010 (C-261/09, EU:C:2010:683).

17 See judgment of 16 November 2010, *Mantello* (C-261/09, EU:C:2010:683, paragraph 46).

18 Judgment of 22 December 2008, *Turansky* (C-491/07, EU:C:2008:768, paragraph 45). See also judgments of 5 June 2014, *M* (C-398/12, EU:C:2014:1057, paragraph 31), and of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 34). This question would, obviously, be for the referring court to establish.

55. Finally, the Court has ruled in *Kossowski* that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person cannot be characterised as a final decision when it is clear that the procedure was closed without a detailed investigation having been carried out.<sup>19</sup>

56. Concerning the case at issue, on the basis of the information provided by the referring court, it will be difficult to determine whether a detailed investigation has been carried out. Stemming from the principle of mutual trust, there is, in my view, a presumption that a thorough investigation has been carried out. In this context, although the (Croatian) referring court is admittedly in a difficult position to explore the practice of the Hungarian authorities, I do not see that such a presumption has been rebutted by the referring court. And yet, these considerations are hypothetical given that, as stated above, proceedings have not been brought *against* AY, which means that Article 3(2) of the Framework Decision is not triggered.

57. I therefore consider that a person who was heard as a witness in criminal proceedings cannot have been ‘finally judged’ by a Member State for the purposes of Article 3(2) of the Framework Decision.

#### *Article 4(3) of the Framework Decision*

58. The first and second questions refer to Article 4(3) of the Framework Decision. The first part of this provision allows the execution of an EAW to be refused where the judicial authorities of the executing Member State have decided either not to prosecute or to halt the proceedings with respect to the offence which is the subject of the EAW.

59. It appears that the competent Hungarian authorities rely on the national provision transposing Article 4(3) of the Framework Decision in order to refuse the execution of this EAW.

60. At the outset, it should be stressed that Article 4(3) of the Framework Decision, which has not, as yet, been interpreted by the Court, constitutes an optional ground of refusal of execution of an EAW. By virtue of this provision, the executing judicial authority may refuse to execute the EAW if it has decided either not to prosecute for the offence on which the EAW is based or to halt proceedings with respect to that offence, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings. In this connection, the executing judicial authority must have a margin of discretion as to whether or not it is appropriate to refuse to execute the EAW.<sup>20</sup>

61. It is often submitted that the first limb of Article 4(3) of the Framework Decision, which is at stake here, is, like Article 3(2), also a manifestation of the *ne bis in idem* principle.<sup>21</sup> While I would not disagree with such an assertion, I think it is important to underline that, as the Commission also rightly points out in its submissions, Article 4(3) of the Framework Decision is wider in scope than the *ne bis in idem* principle. Moreover, due to the optional nature of this provision, the *ne bis in idem* principle cannot be employed to limit this provision or to curtail it.

62. This wider scope is reflected in a correspondingly wider wording. Thus, Article 4(3) of the Framework Decision merely refers to ‘the offence on which the EAW is based’, instead of to the ‘requested person’.

<sup>19</sup> See judgment of 29 June 2016, *Kossowski* (C-486/14, EU:C:2016:483, paragraph 54).

<sup>20</sup> See judgment of 29 June 2017, *Popławski* (C-579/15, EU:C:2017:503, paragraph 21), with respect to Article 4(6) of the Framework Decision.

<sup>21</sup> See, for instance, Klimek, L., *European Arrest Warrant*, Springer, Heidelberg et al., 2015, p. 159, and Cimamonti, S., ‘European Arrest Warrant in practice and *ne bis in idem*’, in: N. Keijzer, E. Van Sliedregt, *The European Arrest Warrant in practice*, T.M.C. Asser, The Hague, 2009, p. 114.

63. According to the Croatian, Czech, Austrian, and Romanian Governments and Ireland, Article 4(3) of the Framework Decision cannot be relied upon when the decision not to prosecute was taken in the course of an investigation in which the requested person was only a witness. This would be contrary to the *ne bis in idem* principle, which aims to protect the *individual* against the negative consequences of double prosecution.

64. In the view of AY and of the Hungarian Government, the fact that AY was only a witness in the Hungarian proceedings is irrelevant for the purposes of Article 4(3) of the Framework Decision. The Commission's observations are similar.

65. In particular, the Hungarian Government argues that the question of what procedural capacity the person mentioned in the EAW was involved in the proceedings that were halted is irrelevant in itself. Rather, it would be necessary to review the merits of the national decision not to prosecute or to halt proceedings. In order for the execution of the EAW to be refused, it would be sufficient that the decision rule on the offence, i.e. that on the same set of actions as the offence on which the issued EAW was based. This was the case here.

66. The wording of the provision in question does not expressly state that the criminal proceedings in question must be directed against the requested person. However, to interpret this provision as meaning that execution could even be refused where the facts in question are the same, but where the persons concerned are different, would appear to me to be too broad. For Article 4(3) of the Framework Decision to be applied, the decision not to initiate criminal proceedings or to discontinue them should concern the requested person, without it being necessary, however, for that person to be formally designated as a defendant or a suspect. What is decisive is that there should be an examination of the possibility that the person sought committed the offence in question has been examined.

67. Such an interpretation, moreover, fully accommodates those national legal systems where the laws of criminal procedure provide for investigations *in rem*<sup>22</sup> to be carried out before investigations *in personam*<sup>23</sup>. There is no need for criminal authorities of a Member State to proceed to the second phase if the first phase leads to the conclusion that no offence was committed. For the purposes of Article 4(3) of the Framework Decision, it should not be relevant whether the criminal investigation was terminated in the phase *in rem* or *in personam*.

68. I therefore understand Article 4(3) of the Framework Decision as meaning that the execution of an EAW may be refused if the judicial authorities of the executing State, which are also competent for prosecution of the offence which is the subject of the EAW, have not initiated proceedings or have brought them to an end, even where the requested person has not been a defendant or suspect in those proceedings, provided that those authorities had examined the possibility that the person had committed the offence in question.

69. My proposed reply to Questions 1 to 4 is, therefore, as follows: A person who was heard as a witness in criminal proceedings cannot have been 'finally judged' by a Member State for the purposes of Article 3(2) of the Framework Decision. Article 4(3) of the Framework Decision is to be interpreted as meaning that the execution of an EAW may be refused if the judicial authorities of the executing Member State, which are also competent for the offence on which the EAW is based have not initiated proceedings or have halted such proceedings, even where the requested person has not been a defendant or suspect in those proceedings, provided that those authorities had examined the possibility that the person had committed the offence in question.

<sup>22</sup> During which it is first established whether an offence was committed.

<sup>23</sup> Where evidence is collected with respect to a specific person.

## Conclusion

70. On the basis of the above considerations, I propose that the Court replies to the request for a preliminary ruling from the Županijski Sud u Zagrebu (County Court, Zagreb, Croatia) as follows:

The Court of Justice of the European Union does not have jurisdiction to answer Questions 1 to 4 referred for a preliminary ruling by the Županijski Sud u Zagrebu (County Court, Zagreb) by decision of 18 May 2017.

By virtue of Article 1(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ('the Framework Decision') the executing judicial authority is required to adopt a decision on a European arrest warrant (EAW) transmitted to it, even where, in that Member State, a previous EAW has already been decided on concerning the same requested person, in the same criminal proceedings, but the second EAW is issued by another judicial authority because of a change of circumstances in the issuing Member State.