



Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 25 June 2020¹

Case C-510/19

Openbaar Ministerie,

**YU,
ZV
v
AZ**

(Request for a preliminary ruling
from the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — European arrest warrant — Framework Decision 2002/584/JHA — Article 6(2) — Concept of executing judicial authority — Article 27(3)(g) and (4) — Request for additional consent agreed to by the public prosecutor's office in the executing Member State)

1. The Court has given several rulings on the concept of 'judicial authority' within the meaning of Article 6(1) of Framework Decision 2002/584/JHA,² and has set out there the conditions that must be met by the authority *issuing* a European arrest warrant (EAW).³
2. This reference for a preliminary ruling gives the Court the opportunity to interpret that provision, but this time in the light of Article 6(2) in conjunction with Article 27 of the Framework Decision. The reference comes from a Belgian court asking, in essence, whether the Netherlands Public Prosecutor's Office may be classified as a 'judicial authority' *consenting* to an extension of the offences recorded in an earlier EAW which has already been executed.

I. Legislative framework

A. EU law. Framework Decision 2002/584

3. Recitals 5, 6 and 8 read as follows:

'(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further, the introduction of a new simplified system of surrender of sentenced

¹ Original language: Spanish.

² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24; 'the Framework Decision').

³ Inter alia, judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutor's Offices in Lyon and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077; 'judgment in *Public Prosecutor's Offices in Lyon and Tours*') and the case-law cited.

or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now between Member States should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.

- (6) The [EAW] provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the “cornerstone” of judicial cooperation.

...

- (8) Decisions on the execution of the [EAW] must be subject to sufficient controls, which means that a judicial authority of the Member State where the requested person has been arrested will have to take the decision on his or her surrender.’

4. In accordance with Article 1 (‘Definition of the [EAW] and obligation to execute it’):

‘1. The [EAW] 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 [EAW] 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.’

5. Article 6 (‘Determination of the competent judicial authorities’) provides:

‘1. The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue [an EAW] by virtue of the law of that State.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the [EAW] by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.’

6. According to Article 14 (‘Hearing of the requested person’):

‘Where the arrested person does not consent to his or her surrender as referred to in Article 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State.’

7. Article 15 (‘Surrender decision’) reads:

‘1. The executing judicial authority shall decide, within the time-limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.

...’

8. Article 19 ('Hearing the person pending the decision') provides:

'1. The requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court.

2. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities.

3. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.'

9. Under Article 27 ('Possible prosecution for other offences'):

'1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.

2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

3. Paragraph 2 does not apply in the following cases:

...

(g) where the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4.

4. A request for consent shall be submitted to the executing judicial authority, accompanied by the information mentioned in Article 8(1) and a translation as referred to in Article 8(2). Consent shall be given when the offence for which it is requested is itself subject to surrender in accordance with the provisions of this Framework Decision. Consent shall be refused on the grounds referred to in Article 3 and otherwise may be refused only on the grounds referred to in Article 4. The decision shall be taken no later than 30 days after receipt of the request.

...'

B. National law

1. Belgian law. Law on the EAW⁴

10. Article 37 states:

‘1. A person who has been surrendered on the basis of a[n EAW] issued by a Belgian judicial authority may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.

2. Paragraph 1 shall not apply in the following cases:

...

Where, other than in the cases provided for in the first subparagraph, the investigating judge, prosecutor or court wishes to prosecute or sentence the person surrendered, or otherwise deprive him or her of his or her liberty, as the case may be, for an offence committed prior to surrender other than that on account of which he or she was surrendered, a request for consent shall be submitted to the executing judicial authority, together with the information mentioned in Article 2(4) and, if necessary, a translation.’

2. Netherlands law

(a) Law of 29 April 2004 transposing the Framework Decision⁵

11. Article 14 provides:

‘1. Surrender shall be allowed only on the general condition that the requested person will not be prosecuted, punished or otherwise have his or her personal freedom curtailed for offences committed prior to his or her surrender for which he or she was not surrendered, unless:

...

(f) the prosecutor’s prior consent was requested and obtained.

...

3. At the request of the issuing judicial authority, and on the basis of a[n EAW] which has been submitted and accompanied by a translation, the prosecutor shall give the consent referred to in paragraph 1(f), ... for offences for which surrender would have been granted under this Law ...’

12. Article 35(1) provides:

‘As soon as possible after the decision granting full or partial consent to the surrender, the requested person shall actually be surrendered. The public prosecutor shall determine the time and place of the surrender after agreeing this with the issuing judicial authority.’

⁴ Wet betreffende het Europees aanhoudingsbevel of 19 December 2003 (Belgisch Staatsblad, 22 December 2003, p. 60075).

⁵ Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Stb. 2004, n.º 195; ‘Olw’). This law was amended with effect from 13 July 2019.

13. In the version prior to 13 July 2019, Article 44 provided:

‘The public prosecutor may act as issuing judicial authority.’

14. In the version in force from 13 July 2019, Article 44 is worded as follows:

‘The investigating judge [rechter-commissaris] may act as issuing judicial authority.’

*(b) Law on the organisation of the courts*⁶

15. In accordance with Article 127, the Minister for Justice and Security may issue general and specific instructions relating to the exercise of the functions and powers of the Public Prosecutor’s Office.

II. Facts giving rise to the dispute and questions referred for a preliminary ruling

16. On 26 September 2017, the investigating judge at the rechtbank van eerste aanleg te Leuven (Court of First Instance, Leuven, Belgium) issued an EAW against AZ, a Belgian national, for the purposes of conducting criminal proceedings in respect of offences of forgery and fraud committed in Belgium in 2017.

17. Having been arrested in the Netherlands pursuant to that EAW, AZ was surrendered to the Belgian authorities on 13 December 2017 by decision of the rechtbank Amsterdam (District Court, Amsterdam, Netherlands).

18. On 26 January 2018, the same investigating judge in Leuven issued a (second) EAW by which it sought AZ’s surrender for offences of forgery and fraud not recorded in the first EAW.

19. On 13 February 2018, the Officier van Justitie (Public Prosecutor) at the arrondissementsparket Amsterdam (Public Prosecutor’s Office for the Amsterdam district, Netherlands) gave his consent for AZ to be prosecuted for all of the offences recorded in both EAWs.

20. Finally, AZ was sentenced to three years’ imprisonment.

21. AZ appealed his conviction to the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium). In that appeal, he challenged the right of the Netherlands Public Prosecutor’s Office to regard itself as a judicial authority within the meaning of Article 6(2) and Article 27(3)(g) and (4) of the Framework Decision.

22. It was in those circumstances that the Hof van beroep te Brussel (Court of Appeal, Brussels) referred the following questions to the Court of Justice for a preliminary ruling:

‘(1.1) Does the term “judicial authority” as referred to in Article 6(2) of the Framework Decision constitute an autonomous concept of EU law?

(1.2) If the answer to Question 1.1 is in the affirmative: which criteria are to be applied for the purpose of determining whether an authority of the executing Member State is such a judicial authority and whether a[n EAW] executed by that authority therefore constitutes such a judicial decision?

⁶ Wet op de Rechterlijke Organisatie of 18 April 1827 (Law on the organisation of the courts; ‘the Wet RO’).

- (1.3) If the answer to Question 1.1 is in the affirmative: is the Netherlands Openbaar Ministerie (Public Prosecution Service), more specifically the Officier van Justitie (Public Prosecutor), covered by the concept of judicial authority, as referred to in Article 6(2) of the Framework Decision, and does the [EAW] executed by that authority thus constitute a judicial decision?
- (1.4) If the answer to Question 1.3 is in the affirmative: is it permissible for the initial surrender to be assessed by a judicial authority, more specifically, the Overleveringskamer (the court responsible for the surrender decision) in Amsterdam, in accordance with Article 15 of the Framework Decision, whereby, inter alia, the defendant's right to be heard and right of access to the courts are respected, whereas the supplementary surrender in accordance with Article 27 of the Framework Decision is assigned to a different authority, namely the Officier van Justitie, whereby the defendant is not guaranteed the right to be heard or to have access to the courts, with the result that there is a manifest lack of coherence within the Framework Decision without any reasonable justification?
- (1.5) If the answer to Questions 1.3 and 1.4 is in the affirmative: should Articles 14, 19 and 27 of the Framework Decision be interpreted as meaning that a public prosecution service acting as the executing judicial authority should first of all respect the defendant's right to be heard and right of access to the courts, before consent can be given for the prosecution, conviction or detention of a person with a view to the execution of a custodial sentence or measure for a criminal offence committed before his or her surrender under [an EAW], the latter offence not being the criminal offence for which his or her surrender was requested?
- (2) Is the Officier van Justitie of the Openbaar Ministerie of the Amsterdam judicial district who acts in implementation of Article 14 of the [Olw] the executing judicial authority within the meaning of Article 6(2) of the Framework Decision which surrendered the requested person and which can grant consent within the meaning of Article 27(3)(g) and 27(4) of the Framework Decision?

III. Procedure before the Court of Justice

23. The request for a preliminary ruling was lodged at the Court of Justice on 4 July 2019.
24. Written observations have been submitted by AZ, the Openbaar Ministerie, the German, Spanish, Hungarian and Netherlands Governments and the Commission.
25. It was not considered necessary to hold a hearing.

IV. Analysis

A. The admissibility of the reference for a preliminary ruling

26. The German Government questions the viability of the reference for a preliminary ruling (although it has not formally objected to its admission) because the questions raised do not pertain to the referring court's ability to dispose of the criminal proceedings pending before it.
27. Those questions are concerned with final legal acts adopted in the Netherlands (AZ's surrender and the consent given by a Netherlands public prosecutor for him to be prosecuted for offences committed prior to his surrender), rather than with the proceedings being conducted before the Belgian referring court. The latter court would not be able to review a surrender decision given by a court in the Netherlands (that is to say, the State executing the EAW).

28. It is true that the referring court cannot rule on the validity of decisions adopted by the Netherlands authorities, which must be determined within the context of the domestic law of the executing Member State (the Netherlands) and by its own courts.

29. The referring court does have jurisdiction, however, to assess the effects which the decisions adopted by the Netherlands authorities in execution of the EAW issued by the Belgian authorities will have in Belgian law. Starting from the premiss that those decisions are valid (which it must take them to be by reason of the principle of mutual trust), the referring court can, as I have said, examine what repercussions they have in national law.

30. A person tried by the Belgian courts has the right under Article 27 of the Framework Decision ‘not to be prosecuted, sentenced or otherwise deprived of liberty except for the offence for which he or she was surrendered’, subject to the exceptions provided for in that provision.⁷

31. On that premiss, AZ could not be sentenced or deprived of his liberty in Belgium for offences other than those set out in the (first) EAW executed by the rechtbank Amsterdam (District Court, Amsterdam), unless the Netherlands authorities had consented to the extension set out in the (second) EAW issued by the Belgian authorities.

32. As the holder of the right thus conferred on him by the Framework Decision, AZ has standing to assert that right before the Belgian courts, which have jurisdiction to prosecute him, convict him or otherwise deprive him of his liberty. It follows that he may rely in his favour on the effects brought about in Belgian law by any irregularity in the executing State’s decision consenting to an extension of the offences set out in the EAW.

33. AZ’s challenge could obviously be brought before the Netherlands authorities, which, as the authorities that granted the consent at issue,⁸ are in a position to cancel it at origin. However, in so far as AZ has already been surrendered to the Belgian authorities, compelling him to challenge that consent before the courts of an executing Member State (the Netherlands) which he has already left might make it difficult for him to exercise his right to effective judicial protection and have the consequence of delaying the criminal proceedings.

34. The Belgian courts, although having no need to examine the validity of the consent given by the Netherlands authorities, can nonetheless assess it from the point of view of EU law, with the assistance of the Court of Justice in the event of any uncertainty. In other words, they can analyse those aspects of the consent that are exclusively dictated by the Framework Decision.

35. In particular, so far as the present case is concerned, the referring court can determine whether the consent was granted by a ‘judicial authority’ within the meaning of Article 6(2) and Article 27 of the Framework Decision, since that term (as I shall explain at length) is an autonomous concept of EU law.

36. If the outcome of that determination is that the Netherlands public prosecutor should not be recognised as having the capacity to act as an executing judicial authority under Article 6(2) and Article 27 of the Framework Decision, the referring court will be able to draw the appropriate consequences in Belgian law.

⁷ Judgment of 1 December 2008, *Leymann and Pustovarov* (C-388/08 PPU, EU:C:2008:669, paragraph 44; ‘judgment in *Leymann and Pustovarov*’).

⁸ By ‘consent’, I refer, in keeping with conventional practice, to that given by the authority in the executing State, under Article 27 of the Framework Decision, for a person already surrendered to be prosecuted, convicted or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that on account of which he or she was surrendered.

37. In short, if the debate is confined to ascertaining whether the Netherlands authority which gave the consent, at the request of the Belgian authorities, can be classified as ‘judicial’ in the context of an EAW and under EU law, I am of the view that the reference for a preliminary ruling is admissible.

B. Substance

1. The autonomous concept of ‘judicial authority’ (first part of the first question referred for a preliminary ruling)

38. With the exception of the Hungarian Government, which has not expressly commented in this regard, those who have intervened in the reference for a preliminary ruling agree that the term ‘judicial authority’ in Article 6(2) of the Framework Decision is an autonomous concept of EU law.

39. I share that view unreservedly. Although the Court’s rulings on that concept have, to date, been given in the context of Article 6(1) of the Framework Decision (issuing authority), its arguments can in my opinion be extrapolated to the interpretation of paragraph 2 of that article (executing authority).

40. According to the Court’s case-law, although, in accordance with the principle of procedural autonomy, the Member States may designate, in their national law, the ‘judicial authority’ with competence to issue an EAW, the meaning and scope of that term cannot be left to the assessment of each Member State. That term ‘requires, throughout the European Union, an autonomous and uniform interpretation, which must take into account the wording of Article 6(1) of [the] Framework Decision ..., its legislative scheme and the objective of that framework decision’.⁹

41. The same reasons apply to the concept of the ‘judicial authority’ competent to execute an EAW and, by extension, in accordance with Article 27(3)(g) and (4) of the Framework Decision, to grant the consent to which those provisions refer.

42. Consequently, the first part of the [first] question referred must be answered in the affirmative. This paves the way for an analysis of the remaining parts of that question, which I shall address jointly.

2. The public prosecutor’s office as an executing authority within the meaning of Article 6(2) of the Framework Decision

(a) The public prosecutor’s office as an issuing judicial authority: the Court’s case-law

43. The Court has already laid down the conditions that must be met by a judicial authority empowered to issue an EAW. Those conditions follow from an interpretation based on three factors: (a) the wording of Article 6(1) of the Framework Decision; (b) its legislative scheme; and (c) the objective of the Framework Decision itself.¹⁰

44. On the basis of the foregoing, the Court has held that the words ‘judicial authority’ ‘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’.¹¹

⁹ Judgment in *Public Prosecutor’s Offices in Lyon and Tours*, paragraph 51 and the case-law cited.

¹⁰ Inter alia, judgment of 27 May 2019, *PF (Prosecutor General of Lithuania)* (C-509/18, EU:C:2019:457, paragraph 28; ‘judgment in *Prosecutor General of Lithuania*’).

¹¹ Judgment of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858, paragraph 33; ‘judgment in *Poltorak*’).

45. In order to identify who, among those who participate in administering justice, merit the status of ‘judicial authority’, the Court has borne in mind that the Framework Decision is ‘a measure governing judicial cooperation in criminal matters, which concerns mutual recognition not only of final judgments delivered by the criminal courts, but more broadly of *decisions adopted by the judicial authorities of the Member States in criminal proceedings*, including the phase of those proceedings relating to criminal prosecution’.¹²

46. In particular, it goes on, ‘the word “proceedings”, which should be understood in a broad sense, is capable of encompassing the entirety of criminal proceedings, namely the pre-trial phase, the trial itself and the enforcement of a final judgment delivered by a criminal court in respect of a person found guilty of a criminal offence’.¹³

47. Being instruments intended to assist judicial cooperation, EAWs may be issued in criminal proceedings in the broad sense of that term, including those in which the part played by the public prosecutor’s offices ‘is to prepare the ground ... for the exercise of judicial power by the criminal courts’.¹⁴

48. In principle, therefore, the concept of ‘judicial authority’ within the meaning of Article 6(1) of the Framework Decision includes public prosecutor’s offices.

49. However, as mutual trust and mutual recognition are key to the scheme of the Framework Decision,¹⁵ ‘the issuing judicial authority must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, *it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant*’.¹⁶

50. Consequently, a public prosecutor’s office may be regarded as a ‘judicial authority’, for the purposes of issuing an EAW, in the case where it enjoys a status such as to ensure its independence, even though this may not necessarily be identical, according to the Court, to *judicial independence*.

51. From that point of view, it is sufficient that ‘there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive’.¹⁷

52. To the two conditions above (participation in the administration of justice and independence in the form of the non-existence of instructions in specific cases from the executive), the Court adds a third, relating to the procedure in which the public prosecutor’s office is empowered to issue an EAW, according to which the issuing of an EAW by the public prosecutor must be amenable to judicial review.¹⁸

¹² Judgment of 27 May 2019, *OG and PI (Public Prosecutor’s Offices in Lübeck and Zwickau)*, (C-508/18 and C-82/19 PPU, EU:C:2019:456, paragraph 52; ‘judgment in *Public Prosecutor’s Offices in Lübeck and Zwickau*’); emphasis added.

¹³ *Ibidem*, paragraph 54.

¹⁴ *Ibidem*, paragraph 62.

¹⁵ Judgment of 10 November 2016, *Kovalkovas* (C-477/16 PPU, EU:C:2016:861, paragraph 27; ‘judgment in *Kovalkovas*’): mutual trust and mutual recognition ‘allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law’.

¹⁶ Judgment in *Public Prosecutor’s Offices in Lübeck and Zwickau*, paragraph 74; emphasis added.

¹⁷ *Ibidem*, paragraph 74.

¹⁸ This requirement ‘is not a condition for classification of that authority as an issuing judicial authority within the meaning of Article 6(1) of [the] Framework Decision ... That requirement does not fall within the scope of the statutory rules and institutional framework of that authority, but concerns the procedure for issuing such a warrant’. Judgment in *Public Prosecutor’s Offices in Lyon and Tours*, paragraph 48.

53. In short, a public prosecutor's office that participates in the administration of justice will be regarded as an 'issuing judicial authority' only if its organisational status is such as to rule out the possibility of it receiving instructions in specific cases from the executive. If so, it will be empowered to issue an EAW, provided that its decision to do so is open to challenge before a court.¹⁹

(b) *The application of that case-law to the public prosecutor's office as the authority executing an EAW*

54. Do the aforementioned conditions, which relate to the status of the public prosecutor's office as an issuing authority, also apply to its classification as an 'executing judicial authority' for an EAW?

55. While AZ and the German and Spanish Governments answer that question in the affirmative, the Netherlands Government favours a less strict application when it comes to the requirements of independence and amenability to judicial review.

56. It will be recalled that, according to the order for reference:

- AZ was surrendered pursuant to the decision of an Amsterdam court acting as 'executing judicial authority' within the meaning of Article 6(2) of the Framework Decision.
- The consent provided for in Article 27 of the Framework Decision, on the other hand, was given by a public prosecutor, also of Amsterdam, whose suitability for doing so is a matter of debate in the main proceedings.

57. In the light of those facts, the referring court asks in particular whether the Netherlands Public Prosecutor's Office is able to execute an EAW, that is to say, to act as a 'judicial authority' within the meaning of Article 6(2) of the Framework Decision.

58. However, that question is meaningful only if it is assumed that the 'consenting judicial authority' (Article 27 of the Framework Decision) is the same as the 'executing judicial authority' (Article 6(2) of the Framework Decision). I have just explained that, in this case, it was a Netherlands court which granted the execution of the EAW, the Netherlands Public Prosecutor's Office having only, at a later stage, given the consent requested by the Belgian authorities to extend the offences with which AZ was charged.

59. The important point here, therefore, is not whether, in the abstract, the Netherlands Public Prosecutor's Office had the status of an 'executing judicial authority', but whether it was able to consent to the aforementioned extension of punishable offences in accordance with Article 27(2)(g) of the Framework Decision.

60. It follows from a textual interpretation of Article 27(2)(g) of the Framework Decision that *consent* can be given only by the entity that *executed* the EAW. The consent to which the legislature refers in that provision is specifically defined as being given by 'the executing judicial authority which surrendered the person'. In my opinion, the clarity of the wording of that provision does not allow for any further discussion.

¹⁹ Strictly speaking, this condition applies to the issuing of an EAW the purpose of which is the pursuit of criminal proceedings. In the case of an EAW issued with a view to the enforcement of a penalty, the Court dismisses the requirement for the decision of the public prosecutor's office to be amenable to judicial review. Judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor's Office in Brussels)* (C-627/19 PPU, EU:C:2019:1079, paragraph 39; judgment in *Public Prosecutor's Office in Brussels*).

61. In accordance with Article 27 of the Framework Decision, therefore, the public prosecutor could not, in circumstances such as those at issue here, consent to an extension of the offences on account of which AZ was surrendered. Pursuant to that provision, consent fell to be given by the Netherlands executing authority (in this instance, the Amsterdam court) which had already surrendered that person to the Belgian authorities.

62. If that is the case, the referring court's question is independent of the specific circumstances of the dispute. Regardless of whether, in the abstract, a public prosecutor's office has the status of an executing judicial authority, the fact that it was a Netherlands court which surrendered the requested person in this case means that the Amsterdam public prosecutor could not give the consent referred to in Article 27(2)(g) of the Framework Decision.

63. The Openbaar Ministerie (Public Prosecutor's Office) argues, conversely, that the procedural autonomy of the Member States, which transcends the wording of Article 27(2)(g) of the Framework Decision, allows them to designate as the 'consenting judicial authority' a 'judicial authority' other than the executing authority.

64. To my mind, that provision does not permit such an interpretation. Rather, it excludes it.

65. The Member States are of course free to decide in their legislation which judicial authority has jurisdiction to execute an EAW. Once that decision has been made, however, the link (established by Article 27(2)(g) of the Framework Decision) between that authority and the authority which consents to an extension of the EAW cannot be severed on the pretext of the principle of procedural autonomy.

66. Under the Framework Decision, those two authorities must be one and the same, a state of affairs that is not open to alteration by the national legislatures. The autonomy of those legislatures runs to the point of designating the executing judicial authority but does not extend to dispensing with the rule laid down by the Framework Decision (that the consenting authority must be the same as the executing authority).

67. There are good reasons for that state of affairs:

- First, the authority which has executed the EAW is best placed to assess whether the latter should be extended, given that it has had an opportunity to familiarise itself with the details of the EAW.
- Secondly, if the consenting authority were different from the authority which has already executed the EAW, the decision by the former would take time which the latter, being familiar with the case, would not need. Such a delay would probably have the effect of prolonging the conduct of the extension procedure and, by the same token, the surrendered person's legal position, which is by definition abnormal from the point of view of the effective enjoyment of his or her rights.²⁰

68. Although I do not ultimately concur with the premiss from which the Openbaar Ministerie (Public Prosecutor's Office) starts, I shall examine its argument in the alternative, starting with the conditions which it would have to meet in order to be able to issue an EAW. I shall then look at the conditions that it would have to fulfil in order to be able to consent to an extension of the offences recorded in an EAW which has already been executed.

²⁰ In the judgment of 9 October 2019, *NJ (Public Prosecutor in Vienna)* (C-489/19 PPU, EU:C:2019:849), the Court recognised that a court could 'endorse' an EAW issued by a public prosecutor's office subordinate to the executive. This does not imply, however, that the Member States may *split* the competence to issue an EAW between two authorities. It simply means that the issuing authority can only be the authority that 'endorsed' the decision of the public prosecutor's office. In the same way, the Member States may allow an authority other than that which executed the EAW to participate in the procedure for granting consent under Article 27 of the Framework Decision, but formal consent can be given only by the executing authority.

(c) The conditions governing the execution of an EAW and the status of the Public Prosecutor's Office in the Netherlands

69. In my view, the three conditions, set out above, that must be met in order for a public prosecutor's office to be able to issue an EAW (namely, participation in the administration of justice, independence and amenability to judicial review)²¹ are transposable to the execution of an EAW.

70. I would recall that the Court has held that, 'as regards a measure, such as the issuing of [an EAW], which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter of Fundamental Rights of the European Union, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted'.²²

71. The same criterion must apply to the execution of an EAW, since this too may have the effect of depriving the person concerned of his or her right to personal liberty. This will obviously be the case where the execution leads, indirectly, to a prison sentence passed following the proceedings conducted against the surrendered person. It will also be the case, however, and at an even earlier stage, if the person concerned is (temporarily) deprived of his or her liberty by the executing judicial authority while the latter reaches a decision on his or her surrender, as it is permitted to do by Article 12 of the Framework Decision.

72. Unlike what happens when an EAW is issued, the judicial protection of the person affected by its execution is not ensured at two levels. In the process for the execution of an EAW, there is no equivalent to the procedure for adopting a national arrest warrant.²³ At the one level which does exist, however, that involving the decision on execution, the guarantee of entitlement to effective judicial protection must be respected.

73. Consequently, an 'executing judicial authority' within the meaning of Article 6(2) of the Framework Decision must be in a position to perform that function objectively and independently. It must not be exposed, any more than the issuing judicial authority should have been, 'to the risk that its decision-making power be subject to external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to [execute] [an EAW] lies with that authority and not, ultimately with the executive'.²⁴

74. A corollary of the foregoing is that the public prosecutor's office will be empowered to execute an EAW in accordance with EU law only if it is not liable to receive directions or instructions from the executive. This was not the case in the Netherlands at the time when the events of this dispute took place, since, in accordance with Article 127 of the Wet RO, the Netherlands Public Prosecutor's Office could receive instructions in specific cases from the executive.

75. By this point, there would be no need to go on to determine whether, in the procedure for the execution of an EAW by the Netherlands Public Prosecutor's Office, provision is made for a judicial review equivalent to that which the Court requires in the case of EAWs which that office would be able to issue if it were independent of the executive.²⁵

²¹ See points 43 to 53 of this Opinion.

²² Judgment in *Public Prosecutor's Offices in Lübeck and Zwickau*, paragraph 68.

²³ Judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraphs 55 to 57). Technically, the procedure for the execution of an EAW might be said to benefit from a triple level of protection: the two levels present in the procedure for issuing an EAW and that represented by the execution procedure.

²⁴ Judgment in *Public Prosecutor's Offices in Lübeck and Zwickau*, paragraph 73.

²⁵ Judgment in *Public Prosecutor's Offices in Lyon and Tours*, paragraph 62: 'where the law of the issuing Member State confers competence to issue [an EAW] on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such [an EAW] and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection'.

76. In that event, the execution of an EAW by the public prosecutor's office would be subject to the same requirement. An action against the decisions of that office would also 'seek to ensure that the monitoring of compliance with the conditions to be met when [executing] [an EAW] ... complies with the requirements inherent in effective judicial protection'.²⁶

(d) The conditions under which the Netherlands Public Prosecutor's Office could consent to an extension of the offences recorded in an EAW which has already been executed

77. As regards the consent provided for in Article 27(2)(g) of the Framework Decision, it is my view that this must be subject to the same conditions as govern the execution of EAWs, the second of which (full independence from the executive) is not met by the Netherlands Public Prosecutor's Office.

78. It follows that the Netherlands Public Prosecutor's Office would not be able to grant the aforementioned consent either, unless the requirement of independence can be defined more clearly than it currently is in the Court's case-law relating to Article 6(1) of the Framework Decision.²⁷

79. The requirement of amenability to judicial review could not be ignored either if consent were given by a public prosecutor's office that is independent of the executive.

80. After all, in asking the executing judicial authority for consent for the person already surrendered to be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence other than that recorded in the EAW that led to the surrender, the issuing judicial authority is, materially or substantively, issuing a *new* EAW.

81. Since that consent is requested in connection with an 'other' offence (that is to say, one which, for whatever reason, was not considered in the EAW that gave rise to the surrender of the requested person), it can be granted only by way of a procedure equivalent to that which led to the execution of that EAW.

82. In those circumstances, what the consent actually authorises is a (substantive) extension²⁸ of the offences with which that person is charged. It is logical, therefore, that, in giving consent, the public prosecutor's office must comply with the same requirements as it would have had to meet in connection with the original EAW, including that its decision must be open to challenge.²⁹

83. In short, even though the Netherlands Public Prosecutor's Office participates in the administration of justice and its decisions are open to judicial review, the risk of it being exposed to directions or instructions in specific cases from the executive means that it cannot be classified as a 'judicial authority' within the meaning of Article 6(2) of the Framework Decision or grant the consent referred to in Article 27(2)(g) thereof.

²⁶ *Ibidem*, paragraph 63.

²⁷ Any other approach would distort the model provided for in the Framework Decision as a system of surrender between judicial authorities that does not involve — other than at a strictly functional and administrative level — the government authority (judgment of 28 June 2012, *West*, C-192/12 PPU, EU:C:2012:404, paragraph 54).

²⁸ The request for consent must not be confused with one for purely descriptive or incidental changes to be made to the offences described in an EAW that has already been executed. The Court allows modifications that do not alter the nature of the original offence or lead to grounds for non-execution (judgment in *Leymann and Pustovarov*, paragraph 57).

²⁹ The Netherlands Government has argued that such a remedy exists in national law, even though it was not used by AZ.

3. The right to be heard in the procedure for giving the consent provided for in Article 27(3)(g) of the Framework Decision

84. The answer I am proposing should be given to the previous questions makes an answer to this one redundant. Nonetheless, in the interests of thoroughness, I shall also comment on the last of the issues raised by the referring court.

85. According to the Openbaar Ministerie (Public Prosecutor's Office) and the Netherlands Government, the Framework Decision does not confer on a person who has already been surrendered the right to be heard by the executing authority before the latter decides whether to consent to an extension of the offences for which he or she may be tried.

86. Article 14 of the Framework Decision provides for the right to be heard of a 'person [who] does not consent to his or her surrender', for which purpose Article 19 establishes a hearing procedure. The Framework Decision says nothing, however, about the acquiescence of a person who has already been surrendered to a request for an extension of the offences with which he or she is charged. As that request is directed at the executing judicial authority, it might be thought that it requires the consent of that authority alone.

87. In my opinion, the Framework Decision's silence in this regard cannot deprive the person surrendered of his or her right to be heard (which is one of the rights of defence inherent in the right to obtain effective judicial protection) before the offences recorded in the original EAW are extended.

88. That extension, if agreed, may mean that the person concerned is prosecuted, sentenced or otherwise deprived of his or her liberty for an offence other than that against which, previously, he or she *was* able to mount a defence. The fact that the decision on the dispute over these matters will therefore have the significant effect of dictating which offences that person may ultimately be tried for goes to show how imperative his or her right to effective judicial protection is.

89. I do not see why that right of defence should be abolished in the second procedure, the consequences of which, I would emphasise, may be just as unfavourable as those of the first (which culminated in the initial EAW), if not more so.

90. Respect for the rights of defence in the procedure for extending offences might take one of these forms:

- Either, as the German Government argues, a hearing could be held as part of the procedure provided for in Article 27 of the Framework Decision.
- Or a person who has already been surrendered could be given the opportunity to raise an objection to the extension with the issuing authority, as a step that must be taken before the issuing authority sends the request to the executing authority.

C. Temporal limitation of the effects of the Court's judgment

91. The Openbaar Ministerie (Public Prosecutor's Office) has claimed that, if the Court finds that that office cannot be regarded as a 'judicial authority' within the meaning of Article 6(2) of the Framework Decision, the preliminary ruling should not have immediate effects.

92. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Before such a limitation can be imposed, those concerned

must have acted in good faith and there must be a risk of serious difficulties.³⁰

93. We must take for granted the good will of the Netherlands authorities, which did not hesitate in bringing their legislation promptly into line with the Court's case-law relating to Article 6(1) of the Framework Decision. The same is not true, however, of the risk of serious difficulties. There is no reason why the immediate application of the interpretation of Article 6(2) of the Framework Decision proposed here should give rise to such difficulties, which, moreover, the Openbaar Ministerie (Public Prosecutor's Office) has not specifically identified anyway.

V. Conclusion

94. In the light of the foregoing, I propose that the Court reply to the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium) as follows:

Article 6(2) 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 the concept of "executing judicial authority", as an autonomous concept of EU law, does not include a public prosecutor's office in a Member State which is exposed to the risk of being subject, directly or indirectly, to directions or instructions in specific cases from the executive.

Article 27(2)(g) and (3) of Framework Decision 2002/584/JHA must be interpreted as meaning that a public prosecutor's office in a Member State which is exposed to the risk of being subject to directions or instructions in specific cases from the executive cannot grant the consent to which that provision refers.

³⁰ Judgment in *Kovalkovas*, paragraph 52 and the case-law cited.