

## **Our vision:**

A world where every person's right to a fair trial is respected.

# Who qualifies as a 'judicial authority' for the purposes of issuing a European Arrest Warrant?

**Fair**

**Trials**

## About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

In Europe, we coordinate the Legal Experts Advisory Panel- the leading criminal justice network in Europe consisting of over 180 criminal defence law firms, academic institutions and civil society organizations. More information about this network and its work on the right to a fair trial in Europe can be found at: [www.fairtrials.org/legal-experts-advisory-panel](http://www.fairtrials.org/legal-experts-advisory-panel)



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On 27 May, the Court of Justice of the EU (“**CJEU**”) issued its ruling in Cases C-509/18 and Joined Cases C-508/18 and C-82/19 PPU on preliminary reference requests from the Irish Supreme Court.

The referring Irish Court is considering the execution of three European Arrest Warrants (“**EAWs**”) for the purposes of conducting a criminal prosecution prior to judgment issued by two German public prosecutor’s offices (Lübeck and Zwickau) and the Prosecutor General of Lithuania.

The defence had argued that the EAWs were not valid, because they had not been issued by a competent “judicial authority” according to the meaning of the Framework Decision on the EAW 2002/584.

Due to the principle of procedural autonomy, it is up to each individual Member State to designate the body or bodies who can issue EAWs. However, the meaning and the scope of the concept of “issuing judicial authority” for the purposes of issuing an EAW is an autonomous concept of EU law, which must be interpreted consistently across the EU. To determine its decision, the referring Irish Court therefore asked the CJEU for guidance about this EU law concept.

The CJEU was, therefore, asked to grapple with the question of how to assess the independence of a public prosecutor from the executive, the Ministry of Justice:

1. In **Germany**, the public prosecutors’ offices are responsible for the prosecution of criminal offences and are subordinate to the Ministry of Justice, and may be subject, directly or indirectly, to directions or instructions in a specific case from that body in connection with the adoption of a decision to issue an EAW. The CJEU concluded that the concept of “judicial authority” does not include public prosecutors’ offices, as they are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue an EAW.
2. However, the concept does include the Prosecutor General of a Member State. The Prosecutor General of **Lithuania**, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him/her a guarantee of independence from the executive in connection with the issuing of an EAW.

### Key points from the CJEU decisions

1. **Public prosecutors are authorities who participate in the administration of criminal justice.** The CJEU confirmed its earlier case-law that the concept of “judicial authority” is not limited to only judges or courts, but more broadly to the authorities “participating in the administration of criminal justice” in each Member State, as distinct from ministries or police services which are part of the executive. This concept extends to public prosecutors, who are competent, in criminal proceedings, to prosecute a person suspected of having committed a criminal offence so that the person may be brought before a court.
2. **The EAW system entails a dual level of protection of procedural and fundamental rights.** First, the person must have had the benefit of protection of procedural and fundamental rights in respect of the decision to issue a national arrest warrant. Second, these rights must also be protected at the stage when the decision is made to also issue an EAW (where the person subject to the national arrest warrant is in another EU Member State). That protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.

3. **The executing authority must be satisfied that procedural and fundamental rights are protected.** Where the law of the issuing Member State confers the competence to issue an EAW on an authority which, whilst participating in the administration of justice in that Member State, is not a judge or a court, the national judicial decision, such as a national arrest warrant, on which the EAW is based, must itself be based on a national procedure (a) that is subject to review by a court and (b) that the person concerned has had the benefit of all appropriate safeguards, including those derived from the fundamental rights and legal principles.
4. **The issuing judicial authority must verify the proportionality of the issuing of an EAW on a case-by-case basis.** The second level of protection of the rights of the person concerned means that the issuing judicial authority must review, in particular, observance of the conditions necessary for the issuing of the EAW and examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant, even where the EAW is based on a national decision delivered by a judge or a court. In addition, where the law of the issuing Member State confers the competence to issue EAWs 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 arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject of court proceedings which meet in full the requirements inherent in effective judicial protection in the Member State.
5. **The “issuing judicial authority” must be capable of exercising its responsibilities objectively.** In order to exercise its role, the issuing judicial authority must be in a position to take into account all incriminatory and exculpatory evidence, without being exposed 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 issue an EAW lies with that authority and not, ultimately, with the executive.
6. **The independence of the issuing judicial authority must be guaranteed by statutory rules and an institutional framework.** 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 an EAW. In particular, the issuing authority must show that there are statutory rules and an institutional framework in place 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 from the executive on a specific case.

### Independence of the Lithuanian Prosecutor General

As regards the Lithuanian prosecutor, the CJEU was satisfied that the Lithuanian Prosecutor General may be considered to be an “issuing judicial authority”:

- The prosecutor is required to satisfy himself/herself that the requirements necessary to issue an EAW are met, in particular, that a judicial decision having immediate effect of remanding a person in custody has been made by a judge or pre-trial investigation court and that the rights of the person concerned have been respected.
- In exercising this function, the Constitution confers upon public prosecutors independence to act freely from any external influence, including from the executive.

### Lack of independence of the German prosecutors

Although the CJEU recognised that the two German public prosecutors’ offices at issue in the main proceedings are required to act objectively and investigate both inculpatory and exculpatory evidence,

the CJEU considered that they are exposed to the risk of being influenced by the executive in their decision to issue an EAW, and therefore, did not comply with the requirements of being regarded as an “issuing judicial authority”.

In particular, the Minister for Justice has the power to issue instructions to public prosecutors. The German Government, in its submissions to the CJEU, confirmed that the power to issue instructions enables the Minister to have a direct influence on a decision of a public prosecutor’s office to issue or, in some cases, not to issue an EAW. However, German law provided safeguards which are capable of circumscribing the power to issue instructions enjoyed by the Minister for Justice in respect of the public prosecutor’s office, so that the situations in which that power could be exercised are extremely rare. Moreover, the public prosecutors’ offices are staffed by officials who cannot be dismissed from their positions simply on account of failure to comply with an instruction.

Despite such safeguards, the CJEU considered that it cannot wholly rule out the possibility, in all circumstances, that a decision of a public prosecutor’s office to issue an EAW may, in a given case, be subject to an instruction from the Minister for Justice. In particular, the CJEU noted that:

- Although a manifestly unlawful instruction from the Minister should not be followed by the public prosecutor, the law does not specify the conditions governing the exercise of that power. This does not, therefore, prevent the Minister for Justice from influencing the discretion enjoyed by the public prosecutors’ offices in deciding to issue an EAW.
- It cannot be ruled out that instructions from the minister may be given orally.
- Although the Minister for Justice may decide not to exercise the power to issue instructions in specific cases, it cannot be ruled out that the situation may be changed in the future by political decision.

In the present case, the CJEU considered that it was irrelevant that, in connection with the issuing of the EAWs at issue in the main proceedings, no instruction in a specific case was issued to the public prosecutor’s office in Lübeck or in Zwickau from the Ministers for Justice of the *Länder* concerned.

### Key points

The CJEU has drawn a firm line in respect of the often blurry relationship that public prosecutors have with Ministries of Justice. The mere fact that the Executive may issue an instruction to a prosecutor, whether that power is exercised or not, means that the prosecutor cannot qualify as “judicial authority” for the purposes of issuing EAWs. This approach is in line with the CJEU’s recent [ruling of 25 July 2018](#), according to which maintaining the independence of such authorities is essential to guarantee the effective judicial protection of individuals.

This has far-reaching implications as regards which authorities are competent to issue other types of cross-border cooperation requests based upon EU mutual recognition instruments. In particular, it will be relevant to assess which authority qualifies for the purposes of issuing cross-border requests for electronic evidence envisaged in the [European Production Order](#) proposed by the EU.

Importantly, the CJEU recognised that EAWs must be subject to a review of proportionality. Fair Trials has argued that what might be acceptable in the national arrest warrant context might not be acceptable in the context of an EAW, given the more extreme impact of an EAW, which involves a person leaving his or her place of residence, and potentially family and social ties, to be extradited to another country. As Fair Trials highlighted in its [2018 report](#), enabling Member States not only to arrest someone, but also to have them extradited to another country, can have considerable impact on the lives and rights of ordinary people. It is key that when considering whether to surrender a person, executing countries verify that issuing authorities have duly considered that the issuing of an EAW is

proportionate in the light of the fundamental rights of the person concerned. In this respect, the [European Investigation Order Directive](#) provides a framework through which it may be possible to analyse the proportionality of an EAW.

Finally, it is great to see the Irish Supreme Court exercising its duty under EU law to ensure effective judicial protection for individuals in the fields covered by EU law, which the CJEU has recognised a shared responsibility between all courts in the EU (Case C-64/16 of 28 February 2018, *Associação Sindical dos Juizes Portugueses*). We hope that other courts across the EU will follow the lead and make references to the CJEU on the many fundamental questions that arise in the field of criminal justice.

***Please consult our EU law material, including guidance on seeking references to the CJEU, available [here](#).***