Country Report: Luxembourg

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Introduction

Due to its small size and history, Luxembourg has a long-standing and well-functioning system of judicial cooperation whereby the large majority of cooperation cases happens with its direct neighbours (i.e., France, Germany, and Belgium). In implementing the Council Framework Decision on the European arrest warrant (**EAW**) and the surrender procedures between Member States (**FD 2002/584**),[1] Luxembourg is typically the *issuing* Member State, with the vast majority of its EAWs issued for prosecution purposes **(Prosecutorial EAWs)**, rather than enforcement of a custodial sentence or detention order **(Custodial EAWs)**.[2] Over many years, its ratio of *issued* EAWs to *executed* EAWs has stayed around 2:1.[3]

This **Country Report (Report)** aims to evaluate the solutions adopted by Luxembourg judicial authorities when implementing FD 2002/584 at both *issuing* and *executing* proceedings. To prepare this Report, we analyzed Luxembourg case law,[4] and carried out interviews with relevant stakeholders in order to gain a concrete

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[1] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, as amended by Council Framework Decision of 26 February 2009 (2009/299/JHA), OJ L 81, 27.3.2009 (**FD 2002/584**).

[2] In 2018, for example, according to the European Commission's most recently published statistics based on Member States' questionnaire responses, Luxembourg *issued* roughly 0.07% of the 27 Member States' 17,471 *issued* EAWs. Of that tiny percentage, over 92% of Luxembourg's issued EAWs were for the purpose of prosecution, rather than the enforcement of a custodial sentence or detention order. European Commission (2020), Commission Staff Working Document: Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018, SWD(2020) 127 final, 2.7.2020, at 9, 27-8.

[3] Ibid.

[4] To locate relevant case law, we scoured Luxembourg's judicial databases: Stradalex Luxembourg (https://www.stradalex.com/en), JUDOC database (https://justice.public.lu/fr/jurisprudence/jurisprudence-judoc.html), and the general jurisprudence database maintained by "La Justice: Grand Duché de Luxembourg" (https://justice.public.lu/fr/jurisprudence/juridictions-judiciaires.html); As JUDOC only offers extracts of decisions deemed to be of judicial interest, we consulted the general jurisprudence database for the full text of any relevant decisions. Finally, if a full decision was not available on the general jurisprudence database, we enlisted the aid of the Legal Documentation Service, which falls under the auspices of the Chief Public Prosecutor, in order to obtain access to the full text of relevant decisions.

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understanding of how the EAW instrument is implemented in Luxembourg. Specifically, we interviewed two Deputy Chief Public Prosecutors from the Public Prosecutor's Office, the Director of investigating judges in the District Court of Diekirch, an investigating judge, a district Public Prosecutor, and a defence lawyer.

We analysed a total of seventeen (17) cases, of which only two (2) dealt with Luxembourg as the *issuing* Member State and the other fifteen (15) dealt with Luxembourg as the *executing* Member State. As explained by investigating judges we interviewed, the overall small number of cases we found suggests that most EAWs are executed through the summary procedure whereby the requested person consents to his/her surrender (see below). The even smaller number of cases concerning EAWs issued in Luxembourg might be explained by the fact – confirmed by one Deputy Chief Public Prosecutor we interviewed – that, in Luxembourg, a decision to issue an EAW is not a decision made publicly accessible. The cases analysed in this Report were selected due to their direct relevance to EAW proceedings in Luxembourg, but also to the jurisprudence of the Court of Justice of the European Union (CJEU) and the wider context of mutual trust and mutual recognition. Overall, we identified the following five key topics Luxembourg has addressed as the *executing* Member State:

- The qualification and independence of a Public Prosecutor as an "issuing judicial authority";
- the proportionality of the sentence imposed by the *issuing* Member State in the context of a Custodial EAW;
- the consequences of a judgment rendered *in absentia* in the *issuing* Member State in the context of a Custodial EAW and the right to contest such a judgment upon surrender;
- the risk of inhuman and/or degrading treatment in relation to the detention conditions in the *issuing* Member State; and
- procedural rights (i.e., the right to translation under Directive 2010/64/EU and the right to access to the case file).

As we will discuss below, Luxembourg courts only dealt to a limited extent with some of the more thorny issues that arise for an *executing* Member State, particularly the deterioration of the rule of law in other Member States and the constitutional specificities that may condition the execution of an EAW.

Section I of this Report begins by discussing the two cases related to EAWs issued in Luxembourg and continues with an analysis of the qualification and independence of Luxembourg's issuing judicial authorities. Section II evaluates the Court of Appeal judgments that have touched on the aforementioned five topics Luxembourg has addressed as the *executing* Member State. Finally, in Section III, we offer a few conclusions that can be drawn from our analysis of Luxembourg's case law and the input we received from our interviews of stakeholders who work with EAWs every day.

Brief overview of the legal framework on the EAW implementation in Luxembourg

Luxembourg relies on five national texts in connection with the EAW:

- the Law of 17 March 2004 on the European arrest warrant and the surrender procedures between Member States of the European Union, as amended **(EAW Law)**;[5]
- the Code of Criminal Procedure, as amended **(CCP)**;[6]
- the Criminal Code, as amended **(CC)**;[7]
- the Law of 7 March 1980 on the judicial organization, as amended **(Judicial Organization Law)**;[8] and
- the Law of 8 March 2017 reinforcing the procedural guarantees in criminal matters.[9]

When Luxembourg is the *issuing* Member State, the investigating judge in the Pre-trial Chamber of the District Court **(District Court)** of the relevant judicial district[10] issues Prosecutorial EAWs,[11] while the Chief Public Prosecutor issues Custodial EAWs.[12] When Luxembourg acts as the *executing* Member State for either a Prosecutorial EAW or a Custodial EAW, the procedure is as follows:

1. The requested person is arrested on the basis of a Schengen Information System (SIS) alert or at the request of the Public Prosecutor in the relevant judicial district.[13]

2. Within 24 hours of arrest, the requested person is brought before an investigating judge who confirms his/her identity and collects that person's statement regarding the offences on which the EAW is based. The investigating judge then decides whether to hold the requested person in custody, taking into account the circumstances described in the EAW or self-described by the requested

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5 *Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne*, as amended, http://legilux.public.lu/eli/etat/leg/loi/2004/03/17/n1/jo (**EAW Law**).

6 *Code de procédure pénale* (**CCP**), as amended, http://legilux.public.lu/eli/etat/leg/code/procedure_penale/20201221. N.B., prior to the entry into force of the Law of 8 March 2017 reinforcing the procedural guarantees in criminal matters, fn 9, *infra,* the CCP was called "*Code d'instruction criminelle*" (**CIC**).

7 *Code pénal* (**CC**), as amended, http://legilux.public.lu/eli/etat/leg/code/penal/20210430. N.B., reference to the CC or to any other criminal law that has not been consolidated into the CC (e.g., *Ordonnance du 13 août 1669 sur le fait des Eaux et Forêts*) is only relevant when Luxembourg considers double criminality pursuant to Art. 3(1) of the EAW Law.

8 *Loi du 7 mars 1980 sur l'organisation judiciaire,* as amended, http://legilux.public.lu/eli/etat/leg/loi/1980/03/07/n1/jo (**Judicial Organisation Law**).

9 *Loi du 8 mars 2017 renforçant les garanties procédurales en matière pénale*, http://legilux.public.lu/eli/etat/leg/loi/2017/03/08/a346/jo. This Law transposed : (i) Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, (ii) Directive 2012/13/EU on the right to information in criminal proceedings, (iii) Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, and (iv) Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

10 Luxembourg has only two judicial districts: Luxembourg and Diekirch.

11 EAW Law, fn 5, *supra,* Art. 26(1).

12 Ibid., Art. 26(2).

13 Ibid., Art. 6.

person.[14] At any point, the requested person may ask the District Court for his/her provisional release.[15]

3. If the requested person consents to his/her surrender, that consent equates to a decision to execute the EAW without any other formality (summary procedure).[16]

4. If the requested person does not consent to his/her surrender, and at the request of the Public Prosecutor, the District Court decides whether to surrender the requested person within twenty (20) days of the date of arrest (ordinary procedure).[17]

5. Either the requested person or the Public Prosecutor may appeal the District Court's decision to the Pre-trial Chamber of the Court of Appeal (Court of Appeal) which must render its decision within twenty (20) days after the appeal has been lodged.[18] The Court of Appeal's decision is not subject to appeal.[19]

[14] Ibid., Art. 8.
[15] Ibid., Art. 9.
[16] Ibid., Art. 10(3).
[17] Ibid., Art. 12.
[18] Ibid., Art. 13.
[19] Ibid., Art. 13(5).

Section I – Issuing of EAWs: rule of law and fundamental rights considerations

Our search for relevant Luxembourg case law revealed only two appellate decisions related to EAWs issued in Luxembourg. While we briefly describe them, neither addressed rule-of-law or fundamental-rights considerations when issuing either Prosecutorial or Custodial EAWs.

The first decision, *arrêt n° 359/13* (Case No. 359/13),[20] involved a Luxembourg-issued Prosecutorial EAW, with the requested person being arrested in the Netherlands. Before being surrendered to Luxembourg and, thus, before the investigating judge's first interrogation (*interrogatoire*), defence counsel sought access to the relevant case file. Relying on then-current CIC Article 85(1),[21] which stated that the file would be made available *after* that first interrogation, the investigating judge refused such access; defence counsel appealed that refusal. The Court of Appeal acknowledged the admissibility of the appeal, finding the refusal to be a judicial action, but rejected the defence's claim it was entitled to access the file before the first interrogation as contrary to the Article's clear and specific language. Case No. 359/13 is now irrelevant, as the specific article (now CCP Article 85(1)) was amended in 2017 to give the accused and defence counsel access to the file before the investigating judge's first interrogation.

The second decision, *arrêt n° 943/16* (Case No. 943/16),[22] involved France's execution of a Luxembourg-issued Prosecutorial EAW. The District Court was asked to invalidate the actions taken by France in France as the *executing* Member State, including the arrest, detention, and surrender of the requested person, based on alleged procedural errors and human rights violations perpetrated by the French authorities in France. The request also asked the District Court to nullify all actions taken in Luxembourg thereafter as they arose out of France's invalid acts. The District Court acknowledged the admissibility of the defence's request, but refused to nullify the procedure on those grounds; defence counsel appealed that decision. The Court of Appeal rejected the appeal. It first found that the District Court erred when it admitted the initial defence request; because the alleged procedural errors and human rights violations occurred in France under French law, the District Court never had jurisdiction to rule thereon and should have found the request inadmissible. The Court of Appeal then rejected the request to nullify all subsequent acts in Luxembourg because the defence's basis for nullification depended on a ruling invalidating France's actions, a ruling Luxembourg courts could not make. Thus, like Case No. 359/13, Case No. 943/16 provides little insight into what Luxembourg's issuing judicial authorities take into consideration when deciding whether to issue an EAW.

Nevertheless, we offer a few comments on a few relevant questions.

[20] Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 1 July 2013, Case No. 359/13.

[21] See definition in fn 6, *supra*.

[22] Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 18 April 2016, Case No. 943/16.

I.1. Qualification and Independence of Luxembourg's Issuing Judicial Authorities

The investigating judge in the relevant District Court is competent to issue Prosecutorial EAWs.[23] As the vast majority of Luxembourg-issued EAWs are Prosecutorial EAWs,[24] a member of Luxembourg's judiciary is its typical issuing judicial authority,[25] such that is not surprising that we found no cases questioning the qualification or independence thereof.

The Chief Public Prosecutor is competent to issue Custodial EAWs.[26] As in several other Member States, Luxembourg's Chief Public Prosecutor and the Public Prosecutor's Office are not part of the judiciary; rather, they fall under the authority of Luxembourg's Ministry of Justice.[27] To date, however, we found no evidence that an executing Member State or requested person has questioned the Chief Public Prosecutor's independence or qualification as one of Luxembourg's issuing judicial authorities. If, however, the question does arise, we believe that Luxembourg's Chief Public Prosecutor would likely qualify, in light of the CJEU's relevant jurisprudence.

The CJEU previously held that the words 'judicial authority' in Article 6(1) FD 2002/584 'are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State'.[28] In this regard, the CJEU determined that police services of a Member State (C-452/16 PPU, *Poltorak*) and a Ministry of Justice (C-477/16 PPU*, Kovalkovas*) did not fall within the term 'judicial authority',[29] but nevertheless held that public prosecutors' offices participate in the administration of criminal justice.[30] Therefore, it can be preliminarily concluded that Luxembourg's Chief Public Prosecutor also participates in the administration of criminal justice. However, such participation does not automatically permit a conclusion that Luxembourg's Chief Public Prosecutor qualifies as an 'issuing judicial authority'.

Further guidance on that question can be drawn from the CJEU's ruling in the joined cases *OG and PI*,[31] where it held that the 'issuing judicial authority'

> must be capable of exercising its responsibilities objectively, taking 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,

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[23] EAW Law, fn 5, *supra,* Art. 26(1).

[24] For example, over 92% in 2018, fn 2, *supra*.

[25] See, for instance, European Commission (2020), Commission Staff Working Document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Luxembourg, SWD(2020) 315 final, 30.9.2020, Abstract ('The Luxembourgish [*sic*] justice system is marked by a high level of perceived judicial independence and an overall good level of efficiency.') (**2020 Rule of Law Report - Luxembourg**).

[26] EAW Law, fn 5, *supra,* Art. 26(2).

[27] Judicial Organization Law, fn 8, *supra,* Art. 70.

[28] Judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and de Tours*, Joined cases C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, para. 52; Judgment (Grand Chamber) of 27 May 2019, *PF (Prosecutor General of Lithuania),* C-509/18, EU:C:2019:457, para. 29; Judgment of 27 May 2019, *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau),* Joined cases C-508/18 and C-82/19 PPU, EU:C:2019:456, para. 50; Judgment of 10 November 2016, *Kovalkovas,* C-477/16 PPU, EU:C:2016:861, para. 34; Judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, para. 33.

[29] *Poltorak*, fn 28, *supra,* para. 34; *Kovalkovas,* fn 28, *supra,* para. 35.

[30] *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau),* fn 28, *supra*, paras. 60-63.

[31] Ibid.

> such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive.[32]

In that regard, the CJEU indicated that the independence of the issuing judicial authority requires

> 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.[33]

In *OG and PI*, the CJEU underlined that, even though German public prosecutor's offices are required to act objectively and to investigate both incriminating and exculpatory evidence, Germany's minister for justice 'has an "external" power to issue instructions in respect of those public prosecutors' offices'.[34] According to the CJEU, that finding cannot be called into question by the fact that 'the executive has decided not to exercise the power to issue instructions in certain specific cases' since – in the absence of a statutory safeguard – 'it cannot be ruled out that the situation may be changed in the future by political decision'.[35] Moreover, it cannot be called into question by the existence of a legal remedy against the public prosecutor's decision to issue an EAW, since 'any instruction in a specific case from the minister for justice to the public prosecutors' offices concerning the issuing of a European arrest warrant remains nevertheless, in any event, permitted by the German legislation'.[36] As a result, the CJEU held that

> The concept of an 'issuing judicial authority', within the meaning of Article 6(1) of [FD 2002/584] must be interpreted as not including public prosecutors' offices of a Member State which 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 a European arrest warrant.[37]

The CJEU reached a similar conclusion in the *NJ* case,[38] which addressed a prosecutorial EAW issued by an Austrian public prosecutor's office; the CJEU found that the office did not satisfy the independence requirement for an issuing judicial authority. In that case, Austrian law stated that Austrian public prosecutor's offices 'are directly subordinate to the higher public prosecutor's offices and subject to their instructions and that the latter are in turn *subordinate to the Federal Minister of Justice*'.[39] By contrast, in the *PF* case,[40] the CJEU held that Lithuania's Prosecutor General could be considered as an 'issuing judicial authority' because both the Lithuanian Constitution and the relevant legislation established the independence of public prosecutors, allowing the Prosecutor General to 'act free of any external influence, inter alia from the

[32] Ibid., para. 73.
[33] Ibid., para. 74.
[34] Ibid., para. 76.
[35] Ibid., para. 83.
[36] Ibid., paras. 85-87.
[37] Ibid., para. 90 (emphasis added).
[38] Judgment of 9 October 2019, *NJ (Parquet de Vienne)*, C-489/19 PPU, EU:C:2019:849.
[39] Ibid., para. 40 (emphasis added).
[40] The case concerned the issuing of a prosecutorial EAW by the Prosecutor General of Lithuania. *PF*, fn 28, *supra.*

executive, in exercising his functions'.[41] More recently, in *Parquet général du Grand-Duché de Luxembourg (and de Tours)*,[42] the CJEU held that

> public prosecutors of a Member State who are responsible for conducting prosecutions and act under the direction and supervision of their hierarchical superiors are covered by the term 'issuing judicial authority', within the meaning of [Article 6(1) of FD 2002/584], *provided that their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of a European arrest warrant*.[43]

Amongst others, the CJEU also held that the independence of French public prosecutors was not called into question by the fact that the Minister for Justice could issue general instructions to them concerning criminal justice policy.[44]

It should be preliminarily noted that all of the aforementioned cases (*OG and PI, NJ*, *PF,* and *Parquet général du Grand-Duché de Luxembourg (and de Tours))* addressed the issuance of *Prosecutorial* EAWs by public prosecutors, and not *Custodial* EAWs as is the case for Luxembourg's Chief Public Prosecutor. Notwithstanding this distinction, the question still arises as to whether there are statutory rules and an institutional framework capable of guaranteeing that Luxembourg's Chief Public Prosecutor is not exposed, when deciding to issue a Custodial EAW, to any risk of being given an instruction from the Minister of Justice in a particular case.

As noted above, Article 70 of the Judicial Organization Law allocates the public prosecution function to the Chief Public Prosecutor, *under the authority* of the Minister of Justice **(MJ)** who is competent, pursuant to Article 19 CCP, to instruct the Chief Public Prosecutor to *prosecute* an individual case.[45] Nevertheless, given that Article 19 CCP is part of Title I of the CCP, which only addresses the authorities in charge of *public prosecution and investigation*, rather than Title IX of the CCP, which addresses the *execution of custodial sentences*, and that Article 19 CCP only allows the MJ to order *prosecution proceedings* (*poursuites*), the MJ's authority does not appear to extend to an ability to order the execution of custodial sentence or detention orders, much less order the issuance of a Custodial EAW. Moreover, according to a Deputy Chief Public Prosecutor we interviewed, while Article 19 CCP remains in force, the MJ has not exercised its authority to order the Chief Public Prosecutor to initiate prosecution proceedings for decades.[46] Further, the Commission's 2020 Rule of Law Report reaffirms that '[t]he power of the Minister of Justice to order the prosecution of a specific case is not used in practice and is accompanied by safeguards'[47] and according to the Commission's 2021 Rule of Law Report, '[t]he legal safeguards surrounding this power combined with the fact that the prosecution service *is in practice recognised as independent*, appear to mitigate the risk to the autonomy of the prosecution service.'[48] Finally, at the time of writing, a proposal to revise Chapter VI of the Constitution of

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41 Ibid., para. 55.

42 *Parquet général du Grand-Duché de Luxembourg (and de Tours*), fn 28, *supra*.

43 Ibid., para. 58 (emphasis added).

44 Ibid., para. 54.

45 CCP, fn 6, *supra,* Art. 19.

46 This is reaffirmed in European Commission (2021), Commission Staff Working Document, 2021 Rule of Law Report, Country Chapter on the rule of law situation in Luxembourg, SWD(2021) 718 final, 20.7.2021, at 3 ('the Minister of Justice has not given instructions in an individual case for more than 20 years') (**2021 Rule of Law Report - Luxembourg**).

47 2020 Rule of Law Report – Luxembourg, fn 25, *supra*, at 3.

48 2021 Rule of Law Report – Luxembourg, fn 46, *supra*, at 3 (emphasis added).

Luxembourg is under examination by Luxembourg's Chamber of Deputies.[49] The proposal's latest version foresees, amongst others, the amendment of Article 87 of the Constitution to formally enshrine the Public Prosecutor's independence in the exercise of individual prosecutions, without prejudice to the government's power to issue criminal policy guidelines.[50] In light of the above, it is likely that Luxembourg's Chief Public Prosecutor would be deemed to satisfy the CJEU's independence requirement and, thus, qualify as an issuing judicial authority within the meaning of Article 6(1) of FD 2002/584.

Notwithstanding the foregoing conclusion, the question remains as to whether the procedure for issuing a Custodial EAW by the Chief Public Prosecutor satisfies the requirement of effective judicial protection under Article 47 of the Charter of Fundamental Rights of the European Union.[51] In this regard, the CJEU, in the *Openbaar Ministerie* case,[52] distinguished between its case law on Prosecutorial EAWs and the case before it, which dealt with the issuance of a Custodial EAW by a Belgian public prosecutor.[53] The CJEU explained that a Custodial EAW is

> based on an enforceable judgment imposing a custodial sentence on the person concerned, by which the presumption of innocence enjoyed by that person is rebutted in judicial proceedings that must meet the requirements laid down in Article 47 of the Charter of Fundamental Rights.[54]

The CJEU explained that

> In such a situation, the judicial review […] which meets the need to ensure effective judicial protection for the person requested on the basis of a European arrest warrant issued for the purposes of executing a sentence, *is carried out by the enforceable judgment*.[55]

[49] For the initial version of the proposal see Proposition de révision du Chapitre VI de la Constitution, Chambre des Députés, Doc. N° 7575, 11.6.2020, available at: https://www.chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=16CA975011B11B65858D929E2848D5986A3E5F9C8A6619EBC988CFB074A3F31A7D869757A56A8483EB55C291102A7C83$FFFBAD87DAE1B512D3A81C6E03AC0135; The latest amendments to the proposal were adopted on 1 June 2021 (Doc. N° 7575/16), and the Commission of Institutions and Constitutional Revision of the Chamber of Deputies adopted its latest report on the proposal on 21 September 2021 (Doc. N° 7575/20). For an overview of the proposal's progress see https://www.chd.lu/wps/portal/public/Accueil/TravailALaChambre/Recherche/RoleDesAffaires?action=doDocpaDetails&id=7575.

[50] Doc. N° 7575/16, 27.7.2021, at 3 (Art. 87(2) : 'Le ministère public exerce l'action publique et requiert l'application de la loi. Il est indépendant dans l'exercice des recherches et poursuites individuelles, sans préjudice du droit du gouvernement d'arrêter des directives de politique pénale.').

[51] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, Art. 47.

[52] Judgment of 12 December 2019, *Openbaar Ministerie (Public Prosecutor, Brussels)*, C-627/19 PPU, EU:C:2019:1079.

[53] Ibid., para. 33.

[54] Ibid., para. 34.

[55] Ibid., para. 35 (emphasis added).

Consequently, it found

> The existence of earlier judicial proceedings ruling on the guilt of the requested person allows the executing judicial authority *to presume that the decision to issue a European arrest warrant for the purposes of executing a sentence is the result of a national procedure in which the person in respect of whom an enforceable judgment has been delivered has had the benefit of all safeguards appropriate to the adoption of that type of decision, including those derived from the fundamental rights and fundamental legal principles* referred to in Article 1(3) of Framework Decision 2002/584.[56]

Moreover, the CJEU explained that the proportionality of a Custodial EAW also follows from the sentence imposed, which, pursuant to Article 2(1) FD 2002/584, must consist of a custodial sentence or a detention order of at least four months.[57] In light of the above, the CJEU concluded that FD 2002/584

> must be interpreted *as not precluding the legislation of a Member State which*, although conferring competence to issue a European arrest warrant for the purposes of executing a sentence on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, *does not provide for a separate judicial remedy against the decision of that authority to issue such a European arrest warrant*.[58]

Therefore, in contrast to Prosecutorial EAWs, judicial review of a decision to issue a Custodial EAW, which is necessary to ensure effective judicial protection, is provided by the enforceable judgment on which that Custodial EAW is based. As a result, executing judicial authorities can presume that the Chief Public Prosecutor's decision to issue a Custodial EAW results from national proceedings in which the requested person has had the benefit of all safeguards. In any case, a Deputy Chief Public Prosecutor we interviewed estimates that Article 696(1) CCP already provides a legal basis for the Court of Appeal's Chamber of the application of sentences (*Chambre de l'application des peines*) to hear appeals against the Chief Public Prosecutor's decisions in the context of the execution of sentences, including the issuing of a Custodial EAW, even though Article 696(1) CCP does not mention the latter.[59] The Deputy Chief Public Prosecutor also informed us that a draft reform (not yet public) of the Law of 20 July 2018 reforming the penitentiary administration,[60] foresees the introduction of a specific appeal procedure against Custodial EAWs before the Court of Appeal's Chamber of the application of sentences. In light of the above, we believe that the issuing of a Custodial EAW by the Chief Public Prosecutor will also likely satisfy the requirement of effective judicial protection.

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[56] Ibid., para. 36.

[57] Ibid., para. 38.

[58] Ibid., para. 39 (emphasis added).

[59] CCP, fn 6, *supra*, Art. 696(1).

[60] *Loi du 20 juillet 2018 portant réforme de l'administration pénitentiaire*, http://legilux.public.lu/eli/etat/leg/loi/2018/07/20/a626/jo.

I.1.1. Proportionality When Issuing an EAW

Although an *issuing* judicial authority (as opposed to the *executing* Member State) is advised to conduct a proportionality analysis prior to issuing an EAW,[61] we found no relevant cases on how Luxembourg's issuing judicial authorities conduct such an analysis[62] because: (a) Luxembourg's issuing judicial authorities do not make their decisions to issue EAWs publicly accessible, (b) neither Case No. 359/13 nor Case No. 943/16 mentions proportionality, and (c) our interviewees offered no particular insights into that decision-making process.

I.1.2. Case Readiness and Pre-trial Detention

Neither Case No. 359/13 nor Case No. 943/16 comment on case readiness. With respect to pre-trial detention, we note that, in Case No. 943/16, the requested person surrendered by France to Luxembourg was, in fact, in custody when the defence's request for invalidation/nullification was made and, apparently, remained in custody while both the District Court and the Court of Appeal made their rulings. Nevertheless, neither decision made more than a passing reference thereto as part of the initial recitals establishing the relevant parties in the proceedings.

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[61] See, for instance, European Commission (2017), Commission Notice – Handbook on how to issue and execute a European arrest warrant, OJ C 335, 6.10.2017, at 14-5, point 2.4 (**Commission's EAW Handbook**) ('[a]n EAW should always be proportional to its aim. Even where the circumstances of the case fall within the scope of Article 2(1) of [FD 2002/584], *issuing judicial authorities* are advised to consider whether issuing an EAW is justified in a particular case. Considering the severe consequences that the execution of an EAW has on the requested person's liberty and the restrictions of free movement, the *issuing judicial authorities* should consider assessing a number of factors in order to determine whether issuing an EAW is justified') (emphasis added); The Commission's EAW Handbook goes on to suggest factors that ought to be considered before issuing an EAW, including, but not limited to, the seriousness of the offence, the likely penalty imposed, the likelihood that the requested person will be detained by the issuing Member State after surrender, and the interests of the victims of the offence. Ibid. It also suggests that alternative judicial cooperation measures could also be explored with other Member States' judicial authorities. Ibid. at 15.

[62] However, in Case No. 791/15, fn 79, *infra*, the Court of Appeal declined to review the proportionality of a custodial sentence in the context of its execution of a Custodial EAW issued by other Member States. See Section II of the Report for further discussion.

Section II – The execution of EAWs: national judicial authorities as monitors of trust

The number of Court of Appeal decisions that address EAW situations in which Luxembourg is the EAW *executing* Member State is also relatively small. When asked about that, investigating judges suggested that that low number likely reflects that most of the EAWs are executed in Luxembourg following the summary procedure (requested person consents to his/her surrender). Nevertheless, as we discuss in more detail, below, that does not mean that Luxembourg takes its responsibilities as the executing Member State lightly.

II.1. Qualification and Independence of the Issuing Member State's Judicial Authority

We only found one Court of Appeal decision addressing the qualification and independence of another Member State's issuing judicial authority: *arrêt n° 630/19* (Case No. 630/19).[63] The two Deputy Chief Public Prosecutors we interviewed assured us that, to date, Luxembourg has yet to confront any other question regarding the qualification or independence of another Member State's issuing judicial authority. Nevertheless, that one Court of Appeal decision demonstrates that, despite the country's close ties to its neighbours and its shared legal traditions, Luxembourg courts are fully prepared to carefully examine the qualification and independence of another Member State's issuing judicial authority.

Indeed, Case No. 630/19 led to the CJEU's preliminary ruling in *Parquet général du Grand-Duché de Luxembourg (and de Tours)*[64] on the autonomous definition of an issuing judicial authority, within the meaning of Article 6(1) of FD 2002/584, with respect to public prosecutors. More specifically, in Case No. 630/19, the requested person argued that, because the French Public Prosecutor's Office could be subject to indirect instructions from the executive, it could not be regarded as an issuing judicial authority within the meaning of Article 6(1) of FD 2002/584, such that the French Prosecutorial EAW seeking his surrender was invalid. Luxembourg's Chief Public Prosecutor, seeking to execute the EAW, argued that the French issuing authority, albeit a public prosecutor, met the CJEU's independence requirement because Article 30 of the French Code of Criminal Procedure expressly stated that France's Minister of Justice could not issue instructions to judges attached to the Public Prosecutor's Office in individual cases.

In a well-reasoned decision to stay its proceedings and seek a preliminary ruling from the CJEU, the Court of Appeal first looked to the CJEU's preliminary ruling in joined cases *OG and PI,*[65] according to which

> the concept of an 'issuing judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, must be interpreted as not including public prosecutors' offices of a Member State which 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 a European arrest warrant.[66]

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[63] Court of Appeal of the Luxembourg (Pre-trial Chamber), Judgment of 9 July 2019, Case No. 630/19.

[64] *Parquet général du Grand-Duché de Luxembourg (and de Tours)*, fn 28, *supra*.

[65] *OG and PI (Public Prosecutor's Offices in Lübeck and Zwickau),* fn 28, *supra*.

[66] Ibid., para. 90.

With that in mind, the Court of Appeal first found that judges attached to the French Public Prosecutor's Office fulfilled the independence requirements set out in *OG and PI*, because the Minister of Justice could not issue instructions to them in individual cases. Nevertheless, the Court of Appeal focused on Article 36 of the French Code of Criminal Procedure, which authorized the Principal Public Prosecutor, if he considered it appropriate, to direct public prosecutors, by written instructions, to commence criminal proceedings or make written submissions to the competent court. Referring to the Advocate General's Opinion in *OG and PI*, the Court of Appeal questioned whether Article 36's hierarchical constraint might be incompatible with the independence a public prosecutor needs in order to qualify as an issuing judicial authority within the meaning of Article 6(1) of FD 2002/584.

The Court of Appeal also considered the decision of the European Court of Human Rights **(ECtHR)** in *Moulin v. France*, in which the ECtHR found that France violated Article 5(3) (right to liberty and security) of the European Convention on Human Rights **(ECHR)**[67] because, different from its bench magistrates, magistrates attached to the French Public Prosecutor's Office had a common hierarchical superior, the Minister of Justice, who is a member of the government and, thus, part of the executive.[68] The Court of Appeal found that, given that the French Public Prosecutor's Office is characterized by its indivisibility – meaning that an action taken by one prosecutor is performed on behalf of the Public Prosecutor's Office as a whole – the ECtHR's decision was still relevant, particularly its finding that the French Public Prosecutor lacked guarantees of independence and impartiality.

In that regard, the Court of Appeal noted that, due to its indivisibility, the French Public Prosecutor had both initiated proceedings against the appellant before the Regional Court of Lyon (*Tribunal de Grande instance de Lyon*) and issued the Prosecutorial EAW. For the Court of Appeal, that raised the question of whether the French Public Prosecutor's Office could satisfy the independence and impartiality requirements, given that it was not only supposed to monitor whether the conditions to be met when issuing an EAW had been complied with and to examine whether such a warrant was proportionate, but also fulfil its role as the authority responsible for conducting the criminal proceedings in the case.

In light of those questions, the Court of Appeal stayed its proceedings in Case No. 639/16, and referred the matter to the CJEU for a preliminary ruling. As translated by the CJEU, Luxembourg's Court of Appeal asked:

> Can the French Public Prosecutor's Office at the investigating court or trial court, which has jurisdiction in France, under the law of that State, to issue a European arrest warrant, be considered to be an issuing judicial authority, within the autonomous meaning of that term in Article 6(1) of […] Framework Decision [2002/584] in circumstances where, [being] deemed to monitor compliance with the conditions necessary for the issue of a European arrest warrant and to examine whether such a warrant is proportionate in relation to the details of the criminal file, it is, at the same time, the authority responsible for the criminal prosecution in the same case?[69]

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[67] *Moulin v. France*, No. 37104/06, 23 November 2010, para. 62.

[68] Ibid., para. 56.

[69] *Parquet général du Grand-Duché de Luxembourg (and de Tours)*, fn 28, *supra*, para. 27.

In responding to that question, after reiterating that the term issuing judicial authority required 'an autonomous and uniform interpretation' throughout the EU,[70] the CJEU found that the French constitutional guarantee of independence of judicial authorities, together with the fact that its Minister of Justice can only issue general instructions concerning criminal justice policy to public prosecutors, were sufficient to demonstrate that French public prosecutors have the requisite

> power to assess independently, in particular in relation to the executive, the necessity and proportionality of a decision to issue a European arrest warrant and exercise that power objectively.[71]

While acknowledging that French public prosecutors were required to comply with instructions from their hierarchical superiors, the CJEU affirmed its previous ruling in *OG and PI* that the independence requirement does not

> prohibit any internal instructions which [*sic*] may be given to public prosecutors by their hierarchical superiors, who are themselves public prosecutors, on the basis of the hierarchical relationship underpinning the functioning of the Public Prosecutor's Office.[72]

It also concluded that the fact that a Public Prosecutor's Office is responsible for conducting prosecutions does not call into question its independence.[73] Thus, the CJEU concluded that

> public prosecutors of a Member State who are responsible for conducting prosecutions and act under the direction and supervision of their hierarchical superiors are covered by the term 'issuing judicial authority', within the meaning of [Article 6(1) of FD 2002/584], provided that their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of a European arrest warrant.[74]

We understand that, once the CJEU's issued its ruling, Luxembourg's Court of Appeal authorized the execution of the French Prosecutorial EAW.[75]

II.2. Proportionality Review when Executing an EAW

As noted in Section I, in light of the 'severe consequences that the execution of an EAW has on the requested person's liberty and the restrictions of free movement',[76] the *issuing* Member State is expected to determine whether issuing an EAW in any particular situation is *a proportionate response* to the alleged crime in the case of a Prosecutorial EAW or the need to enforce a custodial sentence or detention order in the case of a Custodial EAW. Nevertheless, following the adoption of FD 2002/584, the European Commission noted that '[c]onfidence in the application of the EAW has been undermined by the systematic issue of EAWs for the

[70] Ibid., para. 51.

[71] Ibid., paras. 54-55.

[72] Ibid., para. 56.

[73] Ibid., para. 57.

[74] Ibid., para. 58.

[75] Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 21 January 2020, Case No. 73/20. N.B., we were made aware of this decision through one of the Deputy Chief Public Procescutors we interviewed. We have not yet received a copy or an abstract of that decision.

[76] Commission's EAW Handbook, fn 61, *supra*, point 2.4.

surrender of persons sought in respect of often very minor offences' and the subsequent detrimental effect on requested persons and the principle of mutual trust.[77] The Commission suggested that such systematic use could

> lead to a situation in which the *executing* judicial authorities (as opposed to the *issuing* authorities) feel inclined to apply a proportionality test, thus *introducing a ground for refusal that is not in conformity with [FD 2002/584]* or with the principle of mutual recognition on which the measure is based.[78]

It is common knowledge that certain Member States already engage in that practice and in a case involving a Custodial EAW, *arrêt n° 791/15* **(Case No. 791/15)**,[79] Luxembourg's Court of Appeal was handed the perfect opportunity to join the ranks of those Member States.[80] Specifically, Luxembourg was asked to execute a Romanian-issued Custodial EAW, based on a default or *in absentia* judgment, which condemned the requested person to a 20-month custodial sentence for having cut down five trees in a forest. The defence sought to overturn the District Court's decision to surrender the requested person arguing, among other things,[81] that the 20-month prison sentence Romania imposed via that *in absentia* judgment was disproportionate based on the nature of the crime. In support of that argument, the defence noted that the requested person had already been arrested in Germany pursuant to the same Custodial EAW, that the executing German tribunal had already reviewed the proportionality of the prison sentence and found it disproportionate, and that the German tribunal had refused to surrender the requested person and ordered his release, at least in part, on that basis.

The defence's argument effectively invited Luxembourg to adopt the German approach in dealing with its obligation to execute EAWs it perceived to be unwarranted, unjust, or disproportionate; Germany was, in fact, willing to substitute its perception of proportionality for that of the issuing Member State and make its execution decision on that basis (the very approach the Commission feared most).[82] Thus, the Court of Appeal confronted a situation in which the *issuing* Member State not only issued a Custodial EAW for a seemingly (very) minor offense on the basis of a default or *in absentia* judgment that resulted in a seemingly (harsh)

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[77] European Commission (2011), Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final, 11.4.2011, at 7 (**2011 Commission Report on EAW Implementation**); see, also, Mitsilegas, V. (2012), at 326.

[78] 2011 Commission Report on EAW Implemention, fn 77, *supra*, at 8 (emphasis added).

[79] Court of Appeal of the Luxembourg (Pre-trial Chamber), Judgment of 30 September 2015, Case No. 791/15.

[80] In Case No. 38/14, in the context of a Prosecutorial EAW, the Court of Appeal rejected the notion that an *executing* Member State could review the proportionality of the crime the issuing Member State sought to prosecute, finding that FD 2002/584 enshrined the concept of mutual recognition and that its spirit prevented the *executing* Member State from reconsidering the advisability of issuing the EAW, as to do so would create a new, impermissible ground for refusal. Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 16 January 2015, Case No. 38/14.

[81] Although admitting to cutting down the trees, the requested person also argued that Luxembourg should refuse to surrender him because he was condemned *in absentia*, he was not personally summoned or otherwise informed of the date and place of the hearing that led to the *in absentia* judgment (although he admitted to being incarcerated in France at the time, such that he would not have been able to appear), and the Custodial EAW did not include any assurance that he would be given an effective opportunity to contest and overturn that *in absentia* judgment in new proceedings, such that his surrender to Romanian authorities would violate his right to an adversarial trial. It appears that the Public Prosecutor acknowledged those deficiencies and tried to obtain corrective information from the issuing judicial authority prior the deadline for the Court of Appeal's decision and orally amended the Public Prosecutor's request to seek authorization to surrender the requested person *only if* the Romanian issuing authority provided guarantees that the requested person could effectively contest and overturn the *in absentia* judgment. Ibid., at 4.

[82] 2011 Commission Report on EAW Implemention, fn 77, *supra*, at 8.

disproportionate prison sentence, but also continued to seek that Custodial EAW's execution even after one Member State had already refused to do so on those grounds. From a defence perspective, the facts could not have painted a better picture of an *issuing* Member State failing to exercise an appropriate level of restraint when issuing EAWs, particularly with respect to testing the proportionality of its actions in light of the actual circumstances in the case.

Refusing to follow Germany's lead, the Court of Appeal dismissed the requested person's assertion that an *executing* Member State could perform its own proportionality test and refuse to execute an EAW on that basis, *even if* the facts suggest some disproportionality between the nature of the crime and the prison sentence imposed. The Court of Appeal pointed to the exhaustive list of mandatory and optional grounds for non-execution set out in Articles 3 and 4 of FD 2002/584 and expressly stated that if an executing Member State could conduct its own proportionality review and decide not to execute the EAW on that basis, such a review would amount to creating a new ground for refusing to execute an EAW, contravening FD 2002/584 and the principle of mutual recognition it embodies.[83] Although the Court of Appeal did not refer to the 2011 Commission Report on EAW Implementation and the concerns expressed therein,[84] the echoes of that report resound through the Court of Appeal's decision.[85]

Although the Court of Appeal ultimately refused to surrender the requested person and ordered his immediate release in Case No. 791/15, its decision was not based on the alleged disproportionality but rather the Romania's Custodial EAW incompleteness in connection to Article 19 EAW Law (see 2.3. below).[86] Despite the result in the case, the Court of Appeal's reasoning, and the operative portion of the decision, made its categorical rejection of an executing Member State's ability to review the proportionality on another Member State's actions quite plain.[87]

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[83] Ibid., at 5.

[84] Ibid., at 8.

[85] The Court of Appeal acknowledge that, notwithstanding FD 2002/584's specific provisions limiting the executing Member State's ability to refuse to execute an EAW, the Member States are still obliged, pursuant to Article 1(3) of FD 2002/584, to protect the fundamental rights of the requested person and the fundamental legal principles enshrined in Art. 6 TEU. Nevertheless, the Court of Appeal noted that, in the case at hand, the requested person had not alleged such infringement nor did such infringement appear in the file submitted to it. The Court of Appeal's decision made no further mention thereof. We revisit this issue in Section II (2.3), *infra*.

[86] See fn 81, *supra*, setting out the requested person's specific claims. The operative portion of the decision in Case No. 791/15 (author translation): declares the appeal admissible; rejects the plea raised by the appellant alleging the alleged disproportion between the nature of the facts in question (raiding) and the severity of the sentence pronounced on February 10, 2015 by the [Romanian] Criminal Court […], and given the purpose of the European arrest warrant, finds the appeal is well-founded with respect to the other grounds raised; and as reformed, finds that the condition of double criminality is met with regard to the law of August 13 1669 relating to Water and Forests, which punishes raiding timber from a state forest with criminal penalties; declares unfounded the [Public Prosecutor's reformed] request for the surrender of [the requested person] to the Romanian authorities in execution of the European arrest warrant […]; orders the release of [the requested person; and] assigns the costs of the appeal to the State.

[87] Another interesting aspect of Case No. 791/15 relates to Luxembourg's use of double criminality pursuant to Article 2(4) of FD 2002/584 for unlisted crimes. In its decision, the District Court invoked Article 537 of the Penal Code as the Luxembourg equivalent of the crime of cutting down trees. The Court of Appeal, however, indicated that Luxembourg law on the subject was more nuanced, finding that Article 537 did not, in fact, apply to the specified offence because it referred to cutting down trees in a "forest". Accordingly, and pursuant to the Public Prosecutor's request, the Court of Appeal reformed the District Court's decision to include a citation to the correct Luxembourg law: the law of August 13 1669 relating to Water and Forests, which punishes raiding timber from a state forest with criminal penalties. Ibid.

II.3. Judgments Rendered *In Absentia* and the Right to be Heard

Case No. 791/15 also gave the Court of Appeal an opportunity to address a Custodial EAW based on an *in absentia* judgment and the options available to it as the *executing* Member State in connection therewith. As previously mentioned,[88] in response to the arguments laid out by the defence, the Court of Appeal noted that the Romanian-issued Custodial EAW failed to indicate whether the person concerned was summoned to appear in person or had been otherwise informed of the date and place of the hearing that led to the *in absentia* judgment; it also found the Custodial EAW did not provide any assurance that guaranteed the requested person would have an opportunity to apply for a retrial once surrendered and to be present when the judgment in that new trial was rendered. The Court of Appeal further noted that, although EAW Law Article 19[89] prevents it from outright refusing to surrender the requested person for the execution of a custodial sentence or detention order passed down in an *in absentia* judgment, it could condition its surrender on receiving adequate assurances that the requested person would actually be retried and be present when judged. In this regard, the Court of Appeal stated that the existence of a provision in Romanian law that provided for such a retrial would suffice. Moreover, the Public Prosecutor for the Distict Court of Luxembourg had already contacted the Romanian judicial authorities to obtain supplementary information on whether the requested person could apply for a retrial. However, since the Romanian judicial authorities did not provide an answer within the 20-day time limit during which the Court of Appeal had to decide on the appeal, the Court of Appeal refused to execute the Romanian Custodial EAW, and ordered the release of the requested person. It should be noted that the Court of Appeal did not refer to the CJEU's jurisprudence on *in absentia* judgments in the context of FD 2002/584.[90]

II.4. Detention Conditions in the *Issuing* Member State (Risk of Inhuman or Degrading Treatment)

Out of the seventeen EAW-related decisions we found, six involved an allegation that, if surrendered, the requested person would be at risk of inhuman or degrading treatment due to the detention conditions in the *issuing* Member State, five of which were rendered in within a six-day period in mid-April 2016,[91] with the sixth, rendered in Case No. 1091/16, later that same year. These decisions are hereinafter referred to as the **'2016 Detention Decisions'**. The clear impetus for the appeals was the CJEU's preliminary ruling in *Aranyosi and Căldăraru*.[92]

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88 See fn 81, *supra*, for said arguments.

89 Art. 19 of the EAW Law equates to Art. 5(1) of FD 2002/584.

90 For an exhaustive analysis of this line of jurisprudence see, Brodersen, H., V. Glerum and A. Klip, 'Improving Mutual Recognition of European Arrest Warrants for the Purpose of Executing Judgments Rendered Following a Trial at which the Person Concerned Did Not Appear in Person', (www.inabsentieaw.eu/wp-content/uploads/2020/02/InAbsentiEAW-Research-Report-1.pdf).

91 Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 13 April 2016, Case No. 279/16 (Greece – Prosecutorial EAW); Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 289/16 (France–Custodial EAW–same requested person as in Case Nos. 289/16 and 291/16); Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 290/16 (France–Custodial EAW–same requested person as in Case Nos. 289/16 and 291/16); Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 291/16 (France – Prosecutorial EAW – same requested person as in Case Nos. 289/16 and 290/16); and Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 18 April 2016, Case No. 293/16.

92 Judgment of 5 April 2016, *Aranyosi and Căldăraru*, Joined cases C-404/15 and C-659/15 PPU, EU:C:2016:198.

Generally mirroring the CJEU's reasoning in *Aranyosi and Căldăraru*,[93] the 2016 Detention Decisions generally mentioned the need for mutual trust and mutual recognition to create and maintain an area without internal borders, particularly the area of freedom, security and justice, and, thus, the need for Member States, save in exceptional circumstances, to trust that other Member States comply with EU law, protect fundamental rights recognised by EU law, and respect human dignity. They also generally noted that the executing Member State is not permitted to refuse to surrender a requested person on grounds other than those set out in FD 2002/584 *unless* the requested person's fundamental rights and the fundamental legal principles enshrined in Article 6 TEU (including Article 3 ECHR with regard to prisoners' detention conditions) are violated. In that regard, the 2016 Detention Decisions recognize that an executing Member State is supposed to conduct the *Aranyosi and Căldăraru* two-part assessment of the risk of inhuman or degrading treatment due to the general detention conditions in the *issuing* Member State, but also reiterate the CJEU's ruling in that judgment that even

> a finding that there is a real risk of inhuman or degrading treatment by virtue of general conditions of detention in the *issuing* Member State *cannot lead, in itself, to the refusal to execute a European arrest warrant*.[94]

Rather, the CJEU makes clear that the executing Member State only moves on to the second step,

> [w]henever the existence of such a risk is identified, it is then necessary that the executing judicial authority make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State.[95]

In implementing the two-part *Aranyosi and Căldăraru* assessment in the 2016 Detention Decisions, the Court of Appeal apparently found that the information in the case files was not sufficiently "objective, reliable, specific and properly updated" to allow it to conclude that there was indeed 'a real risk of inhuman or degrading treatment by virtue of general conditions of detention to find that that systemic or generalised detention conditions prevailing in the *issuing* Member State'.[96]

In making that holding in the different decisions, the Court of Appeal applied the *Aranyosi and Căldăraru* two-step assessment but not in an elaborate and methodological manner. In fact, the Court of Appeal limited itself to a conclusion combining the two steps by holding that the file submitted to it did not include objective, reliable, specific and properly updated evidence of serious deficiencies in the penitentiary establishments of the issuing Member State in question (i.e., first step) which, in the concrete case of the appellant, would indicate that his detention would amount to inhuman or degrading treatment (i.e., second step). For instance, in one case, the Court of Appeal held that the appellant limited himself to allege that his imprisonment in Romania would expose him to the risk of inhuman or degrading treatment without providing any further details in this regard.[97] It is also worth noting that in all of the cited cases, contrary to what the executing judicial authority *must* do, according to the CJEU's ruling in *Aranyosi and Căldăraru,*[98] the Court of Appeal did not

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[93] The Court of Appeal typically refered to paras. 78-90, and 92 in the CJEU's *Aranyosi and Căldăraru* ruling.

[94] *Aranyosi and Căldăraru*, fn 92, *supra,* para. 78 (emphasis added).

[95] Ibid., para. 92 (emphasis added).

[96] Ibid., para. 89.

[97] Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 20 December 2016, Case No. 1091/16.

[98] *Aranyosi and Căldăraru*, fn 92, *supra,* para. 95.

request all necessary supplementary information on the envisaged detention conditions from the issuing judicial authority. In certain cases, the Court of Appeal pointed out that even if the current detention conditions in the issuing Member State were, from the point of view of health care, more unfavourable than those existing in Luxembourg, this element was not, in itself, sufficient to justify the refusal of the appellant's surrender.[99]

II.5. Right to Translation under Directive 2010/64/EU

Although the CJEU has yet to rule on the interpretation of provisions of Directive 2010/64/EU[100] in the context of EAWs, the rights assured by Directive 2010/64/EU are nonetheless applicable when a Member State executes an EAW.[101] More specifically, Article 3(6) thereof requires the *executing* Member State to provide a written translation of the EAW to a suspect or accused person who does not understand the language of the EAW, although Article 3(7) thereof permits an executing Member State to provide an oral translation or oral summary of essential documents (including the EAW) if doing so does not prejudice the fairness of the proceedings. In that regard, the right to translation in criminal proceedings forms part of the more general right to a fair trial, as it enables suspects or accused persons, who do not understand the language of proceedings, to exercise their right of defence and to safeguard the procedural fairness.[102]

We found two District Court decisions addressing Directive 2010/64/EU's right to translation in EAW proceedings, both of which had been rendered before Luxembourg transposed the Directive in 2017.[103] In both decisions, the District Court held that the requested person, a French speaker who could not understand the EAW written in German, was entitled to invoke the provisions of Directive 2010/64/EU since, pursuant to Article 1(3) of the EAW Law, an EAW is a judicial decision which can lead to the deprivation of the requested person's liberty. Relying on interpretations of the Directive in unrelated Court of Appeal decisions, the District Court noted that the prejudice arising from a failure to provide a written translation pursuant to Article 3(1) and (2) of Directive 2010/64/EU,[104] is to be assessed *in concreto* in relation to the particular case. In both cases, the District Court found that there was no such prejudice because the requested person was represented by French-speaking counsel and was present for proceedings that took place in French. The District Court further noted that a failure to provide a written translation of essential documents under said Articles 3(1) and (2) carried no penalty and, thus, could not result in either a refusal to execute the EAW (**Case No. 1654/14**) or a requested person's provisional release (**Case No. 1655/15).** The Distict Court's conclusion seems justified since neither FD 2002/584 nor Luxembourg's EAW Law list the non-respect of the provisions of Directive 2010/64/EU as a ground for refusal (either mandatory or optional) to execute an EAW.

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[99] Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 291/16; Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 290/16; Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 15 April 2016, Case No. 289/16; Court of Appeal of Luxembourg (Pre-trial Chamber), Judgment of 13 April 2016, Case No. 279/16.

[100] European Parliament and Council (2010), Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010.

[101] Ibid., Rec. 15, Art. 3(6).

[102] Ibid.

[103] District Court of Luxembourg (Pre-trial Chamber), Judgment of 26 June 2014, Case No. 1654/14 (German – Prosecutorial EAW) and District Court of Luxembourg (Pre-trial Chamber), Judgment of 26 June 2014, Case No. 1655/14; Directive 2010/64/EU was transposed in Luxembourg by the Law of 8 March 2017 reinforcing procedural guarantees in criminal matters, fn 9, *supra*.

[104] No mention was made of the Directive's Arts. 3(6) or 3(7).

The legislation transposing Directive 2010/64/EU introduced Article 3-3 within the CCP which provides that a person, who does not understand the language of the procedure, has the right to be provided, within a reasonable period of time, with a free translation of all documents which are essential in allowing him/her to exercise his/her right of defence and to safeguard the fairness of the proceedings.[105] Furthermore, Article 3-3(3) provides a list of documents (including an EAW) which must be translated automatically (*d'office*) if it appears that the person does not understand the language of the procedure.[106]

II.6. Right of Access to the Case File

The right to access the case file forms part of the general right to information in criminal proceedings. As with the right to translation, it is a necessary component for a fair trial as it allows a practical and effective preparation of a defence and guarantees the fairness of proceedings. As shown by Luxembourg jurisprudence, discussed below, and confirmed by a defence lawyer we interviewed, the right to access the case file is, in the view of Luxembourg defence lawyers, the most critical procedural guarantee. According to the defence lawyer we interviewed, despite the fact that the CCP enshrines the right to access the case file, defence lawyers still find it difficult to gain access in practice.[107]

Defence lawyers' difficulty in accessing the case file is further complicated in light of the CJEU's recent preliminary ruling in *Spetsializirana prokuratura* (C-649/19),[108] which concerned the interpretation of the provisions of Directive 2012/13/EU on the right to information in criminal proceedings,[109] in the context of the EAW. Among the questions posed to the CJEU was whether Article 7(1) of Directive 2012/13/EU (right of access to the materials of the case) applied to persons arrested for the purposes of executing an EAW. In analysing the context of Article 7(1) and the objectives of Directive 2012/13/EU, the CJEU concluded that Article 7(1) did not apply to persons who were arrested for the purposes of the execution of an EAW.[110] Nevertheless, the CJEU concluded that

> the person who is the subject of a European arrest warrant issued for the purposes of criminal prosecution, acquires, *from the moment of his or her surrender to the authorities of the Member State that issued that warrant*, the status of "accused person" within the meaning of Directive 2012/13 and therefore enjoys all the rights associated with that status [including the right to access the essential documents of the case file under Article 7(1)].[111]

[105] CCP, fn 6, *supra,* Art. 3-3(1); Pursuant to Art. 3-3(7) CCP, exceptionally and on condition that it does not prejudice the fairness of the proceedings, an oral translation or an oral summary of the essential documents may be provided.

[106] Ibid., Art. 3-3(3).

[107] The defence lawyers' concern over access to the case file dates back to the early years of the EAW implementation in Luxembourg, *see* Council of the European Union (2007), Evaluation Report on the Fourth Round of Mutual Evaluations "Practical Application of the European Arrest Warrant and Corresponding Surrender Procedures Between Member States" Report on Luxembourg, 10086/2/07 REV 2, 19.11.2007, at 30.

[108] Judgment of 28 January 2021, *Spetsializirana prokuratura*, C-649/19, EU:C:2021:75.

[109] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 1.6.2012, Art. 7(1).

[110] *Spetsializirana prokuratura*, fn 108, *supra*, para. 56.

[111] Ibid., para. 77 (emphasis added).

According to the CJEU,

> the right to effective judicial protection does not require that the right […] to challenge the decision to issue a European arrest warrant for the purposes of criminal prosecution can be exercised before the surrender of the person concerned.[112]

Thus, the CJEU held that the mere fact that the requested person

> is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he or she is surrendered […] *cannot result in any infringement of the right to effective judicial protection*.[113]

In practice, the CJEU's ruling would, therefore, allow Luxembourg authorities to refuse a requested person's access to the materials of the case simply because the requested person has not yet been surrendered to the authorities of the issuing Member State, in order to acquire the status of "accused person".

Prior to the transposition of Directive 2012/13/EU, Article 85 CIC[114] postponed the requested person's access to the criminal case file until after his first interrogation (*interrogatoire*) before an investigating judge. In 2017, the Law of 8 March 2017 reinforcing the procedural guarantees in criminal matters transposed Directive 2012/13/EU.[115] As a result, Article 85 CCP[116] was amended and now provides that the person to be interrogated and his or her lawyer can consult the case file even before the first interrogation by the investigating judge, except for what relates to 'duties in progress' (*devoirs en cours d'exécution*).[117]

Prior to the transposition of Directive 2012/13/EU, the issue of the requested person's right to access the case file arose before both Luxembourg courts and the ECtHR. The case before Luxembourg's Court of Appeal concerned an individual arrested in the Netherlands on the basis of an EAW issued in Luxembourg.[118] The requested person alleged a violation of Article 6 ECHR because, pursuant to Article 85 CIC, the Luxembourg authorities postponed the requested person's access to the criminal case file until after his first interrogation before an investigating judge. In light of Luxembourg law in force at the time of the case and the evolutions of conceptions on the right to access to a lawyer, in Luxembourg and the countries of both the EU and the Council of Europe, the Court of Appeal found that the right of access to a lawyer did not imply the right of access to the case file prior to the suspect's interview by the police or prior to his first interrogation before the investigating judge.[119] The Court of Appeal noted that Article 4 (content of the right of access to a lawyer) of the 2011 proposal for a Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest,[120] did not enshrine the right of access to the entirety or part of the case file even before the first hearings. As a result, the Court of Appeal rejected the individual's alleged violation of Article 6 ECHR.

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[112] Ibid., para. 79.

[113] Ibid., para. 80 (emphasis added).

[114] See fn 6, *supra.*

[115] Law of 8 March 2017 reinforcing the procedural guarantees in criminal matters, fn 9, *supra*.

[116] The Law of 8 March 2017 changed the title of the Code of Criminal investigation.

[117] CCP, fn 6, *supra,* Art. 85(1).

[118] Case No. 359/13, fn 20, *supra*.

[119] Ibid.

[120] European Commission (2011), Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM(2011) 326 final, 8.6.2011, Art. 4.

In 2015, the issue of access to the criminal case file under Luxembourg law was also examined by the Strasbourg Court in the case *A.T. v. Luxembourg*.[121] The applicant alleged a violation of Article 6 ECHR because he could not consult the case file before the first interrogation by the investigating judge. The ECtHR found that it was reasonable that the domestic authorities justified the lack of access to the case file with reasons of protecting the interests of justice.[122] It noted that Luxembourg law allowed the applicant to organise his defence and that a proper balance was 'ensured by the guarantee on access to the case file, from the end of the first interrogation, before the investigating authorities and throughout the substantive proceedings'.[123] It held that Article 6 ECHR could not 'be interpreted as guaranteeing unlimited access to the criminal case file before the first interrogation by the investigating judge where the domestic authorities have sufficient reasons relating to the protection of the interests of justice not to impede the effectiveness of the investigations'.[124] The ECtHR concluded that there was no violation of Article 6 ECHR since the lawyer's assistance during the applicant's interrogation was not ineffective due to a lack of access to the case file before that interrogation.[125]

[121] *A.T. v. Luxembourg*, no 30460/13, 9 April 2015.
[122] Ibid., para. 79.
[123] Ibid.
[124] Ibid., para. 81.
[125] Ibid., paras. 83-4.

Section III – Mutual Trust and cooperation through the EAW: key interpretation and implementation challenges, and solutions adopted in Luxembourg

The previous discussion of Luxembourg jurisprudence and our interviews with two Deputy Chief Public Prosecutors, investigating judges, and a defence lawyer, confirm that when acting as the *executing* Member State, Luxembourg heavily relies on mutual trust and a broad application of mutual recognition. As a result, it seldomly refuses to execute an EAW. The solutions adopted by Luxembourg courts do not reflect any major challenges with regard to the principle of mutual recognition, the application of EU fundamental rights, or rule of law safeguards. On the contrary, Luxembourg courts reaffirmed, in many instances, the importance of the principles of mutual trust and mutual recognition and of the EU fundamental-rights *acquis*. These conclusions are primarily illustrated by Luxembourg's jurisprudence on the detention conditions in the issuing Member States, with Luxembourg courts consistently referring to the principles of mutual trust and mutual recognition when justifying the execution of the EAWs.

When faced with interpretative challenges, such as those in Case No. 630/19, in which the Court of Appeal had to examine the qualification and independence of the French Public Prosecutor, the Court of Appeal made use of the preliminary reference mechanism in order to resolve the challenge. Nevertheless, that case remains the only EAW-related request for a preliminary reference by Luxembourg courts. Moreover, as illustrated by Luxembourg decisions on detention conditions, Luxembourg courts consistently refer to the relevant jurisprudence of the CJEU. Nevertheless, decisions of Luxembourg courts on this topic do not reflect an elaborate and methodological reasoning when applying the CJEU's jurisprudence, but rather a swift conclusion combining the two-part assessment laid down in *Aranyosi and Căldăraru*. Perhaps, this may be explained by the drafting traditions of Luxembourg judges, as evidenced by the relatively short length of their decisions. Overall, Luxembourg jurisprudence on EAWs illustrates that Luxembourg courts apply the minimum standards of EU law in order to reach a solution on the implementation of an EAW. For instance, in Case 791/15, concerning the execution in Luxembourg of a Custodial EAW for a sentence passed in an *in absentia* judgment, the Court of Appeal stressed that the principle according to which the execution of an EAW cannot be refused for grounds other than those provided by FD 2002/584 only applies on condition that the requested person's fundamental rights under EU law are respected. That indicates that, although Luxembourg rarely refuses to execute an EAW, Luxembourg courts do not confuse the principle of mutual trust with blind trust.[126]

The Luxembourg practitioners we interviewed also noted that the implementation of EAW law in Luxembourg does not pose any major challenges. A Deputy Chief Public Prosecutor noted that when Luxembourg authorities involved in EAW implementation confront issues, they are more of a practical nature (e.g., transfer of documents, language) rather than a substantive one. From a defence perspective, a defence lawyer highlighted the defence lawyers' difficulty in accessing the case file as their main concern in the implementation of EAWs in Luxembourg. According to the defence lawyer interviewed, defence lawyers do not get access to the case file even when the suspect is under arrest or in police custody and are most often told to request the case file from the authorities of the issuing Member State. Prior to the transposition of

[126] Lenaerts, K. (2017).

Directive 2012/13/EU on the right to information in criminal proceedings, Luxembourg's CIC[127] postponed the requested person's access to the case file until after his first interrogation before the investigating judge. Arguments made by requested persons that this constituted a violation of Article 6 ECHR were rejected by both the Court of Appeal and the ECtHR. Following the transposition of Directive 2012/13/EU in 2017, the case file can be accessed even before the first interrogation by the investigating judge, except for what relates to 'duties in progress' (*devoirs en cours d'exécution*). However, defence lawyers note that this is not necessarily reflected in practice. Defence lawyers' difficulty in accessing the case file is further complicated in light of the CJEU's recent preliminary ruling in *Spetsializirana prokuratura* (C-649/19) which held that the right to access the essential documents of the case file, under Article 7(1) of the Directive 2012/13/EU, applies to the requested person only after his or her surrender to the authorities of the issuing Member State for the purposes of a prosecution, as it is only then that he or she acquires the status of an 'accused person' within the meaning of Directive 2012/13/EU.

[127] CIC, fn 6, *supra*, Art. 85.

LIST OF TRANSLATIONS

- Chief Public Prosecutor = *Procureur Général d'État*
- Code of Criminal Procedure = *Code de procédure pénale*
- Court of Appeal = *Cour d'Appel*
- Criminal code = *Code pénal*
- Deputy Chief Public Prosecutor = *Procureur Général d'État adjoint*
- District Court = *Tribunal d'arrondissement*
- Interrogation = *Interrogatoire*
- Investigating judge = *Juge d'instruction*
- Law of 7 March 1980 on the judicial organization = *Loi du 7 mars 1980 sur l'organisation judiciaire*
- Legal Documentation Service = *Service de Documentation Juridique*
- Pre-Trial Chamber = *Chambre du conseil*
- Public Prosecutor = *Procureur d'État*
- Public Prosecutor's Office = *Parquet Général d'État*

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