

Case C-649/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

3 September 2019

Referring court:

Spetsializiran nakazatelen sad (Specialised Criminal Court, Bulgaria)

Date of the decision to refer:

20 August 2019

Criminal proceedings against:

IR

Subject matter of the main proceedings

Procedure for the issuing of a European arrest warrant for the purposes of prosecution

Subject matter and legal basis of the reference

Interpretation and review of the applicability of provisions of EU law; Article 267 TFEU

Questions referred

1. Do the rights of an accused person under Article 4 (in particular the right under Article 4(3)), Article 6(2) and Article 7(1) of Directive 2012/13 apply to an accused person who has been arrested on the basis of a European arrest warrant?
2. If the first question is answered in the affirmative: is Article 8 of Framework Decision 2002/584 to be interpreted as meaning that it allows the content of a European arrest warrant to be amended with regard to the form specified in the annex, in particular the insertion of new text into that form, in relation to

the rights of the requested person against the judicial authorities of the issuing Member State to challenge the validity of the national arrest warrant and of the European arrest warrant?

3. If the second question is answered in the negative: is it compatible with recital 12 and Article 1(3) of Framework Decision 2002/584, Articles 4, 6(2) and 7(1) of Directive 2012/13/EU and Articles 6 and 47 of the Charter if a European arrest warrant is issued in strict compliance with the form set out in the annex (that is to say without informing the requested person about his rights against the issuing judicial authority) and the issuing judicial authority informs him about the rights to which he is entitled and sends him the relevant documents immediately after that authority becomes aware of the arrest?
4. If there are no other legal means for safeguarding the rights of a person arrested on the basis of a European arrest warrant under Article 4 of Directive 2012/13/EU, in particular the right under Article 4(3), Article 6(2) and Article 7(1) of Directive 2012/13/EU, is Framework Decision 2002/584 valid?

Provisions of EU law and the case-law cited

Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA (OJ 2009 L 81, p. 24)

Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings (OJ 2012 L 142, p. 1)

Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1)

Charter of Fundamental Rights of the European Union (OJ 2012, C 326, p. 391)

Judgments of the Court of Justice of the European Union of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858), of 23 January 2018, *Piotrowski* (C-367/16, EU:C:2018:27), of 25 July 2018, *AY* (C-268/17, EU:C:2018:602), of 6 December 2018, *IK* (C-551/18 PPU, EU:C:2018:991), and of 27 May 2019, *OG and PI* (C-508/18 and C-82/19 PPU, EU:C:2019:456), and *PF* (C-509/18, EU:C:2019:457); Opinion of the Advocate General Y. Bot in the *Gavanozov* case (C-324/17, EU:C:2019:312)

Provisions of national law cited

Zakon za ekstraditsiata i evropeyiskata zapoved za arest (Law on extradition and the European arrest warrant, Bulgaria), Article 37

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure, 'the NPK'), Articles 55, 65, 269 and 270

Zakon za ministerstvoto na vatreshnite raboti (Law on the Ministry for Home Affairs, Bulgaria, 'the ZMVR'), Articles 72 to 74

Brief summary of the facts and procedure

- 1 Proceedings were brought against Mr IR for participation in a criminal organisation that allegedly transports large quantities of excise goods without strip stamps ('tax stamps') across national borders for the purpose of financial gain, and for aiding and abetting in the storage of excise goods without tax stamps. The two offences are punishable by imprisonment of up to ten and eight years, respectively.
- 2 At the beginning of the trial phase of the proceedings on 24 February 2017, IR had left his home address. The efforts of the court to determine his place of residence were unsuccessful. He was appointed a public defender. By order of 10 April 2017, which was upheld on appeal on 19 April 2017, the referring court issued a 'remand in custody pending trial' measure against IR (this instrument constitutes a national arrest warrant). IR did not personally appear in these proceedings; he was defended by the lawyer who was appointed [for him].
- 3 On 25 May 2017, the referring court issued a European arrest warrant for IR. It stated that the national arrest warrant had been issued against IR in absentia (Chapter d, point 2), that the national arrest warrant would be handed over to IR in person upon his surrender following execution of the European arrest warrant, and that he would be informed of his rights and would be able to challenge the decision, whereby the possibilities available in that regard would be explained to him (Chapter d, point 3.4). In addition, it was stated that he would only be able to take action against his imprisonment (remand in custody pending trial) once he had been surrendered to the Bulgarian authorities (Chapter d, point 4).
- 4 IR has not yet been found and arrested.
- 5 There is no information indicating that IR is aware that criminal proceedings have been brought against him before a court, that there is a legal act regarding his detention both in the territory of [Bulgaria] and in the European Union, that he is being defended by a lawyer appointed for him, or that he is aware of the details of that lawyer.
- 6 In the light of Directive 2012/13 and the new case-law of the Court of Justice of the European Union in the *OG* and *PI* case (C-508/18) and in the *PF* case (C-509/18) and the Opinion of the Advocate General in the *Gavanozov* case (C-324/17), the national court has doubts as to whether a European arrest warrant issued in this way complies with EU law, in so far as it does not guarantee adequate legal protection for IR. More specifically, it does not give him a real

opportunity to request the withdrawal of the national arrest warrant and the European arrest warrant in the issuing Member State (before the referring court) immediately after being arrested in the executing Member State. He can do so only after being surrendered upon execution of the European arrest warrant.

- 7 The referring court therefore withdrew the European arrest warrant issued and took the decision to issue a new European arrest warrant which would be drawn up in such a way, or accompanied by such documents (information regarding rights and copies of the documents relating to the [order for] imprisonment), as would safeguard the rights arising from Directive 2012/13. In order to do so, however, it requires clarification from the Court of Justice.

Brief summary of the basis for the reference

Admissibility of the reference

- 8 IR has not been arrested on the basis of the European arrest warrant issued and cannot be arrested in the future either, as the arrest warrant was withdrawn. The questions are not, however, hypothetical.
- 9 The purpose of the request for a preliminary ruling is to establish whether it is compatible with EU law for an arrest warrant to be reissued with the same content, or whether a new European arrest warrant containing different content that safeguards the rights of IR should be issued, or whether IR's rights arising from Directive 2012/13 should be safeguarded in a different way.
- 10 The referring court takes the view that it would not be appropriate to wait for the arrest of IR in another Member State and only then ask these questions, since his rights would have been irreversibly impaired. Moreover, the referring court would not be informed of IR's arrest until he had been surrendered. At that point, however, the arrest would be based solely on the national arrest warrant and the questions referred for a preliminary ruling would therefore no longer be relevant.
- 11 Where the rights conferred on a Union citizen by EU law may be infringed by a measure of a national judicial authority, a request for a preliminary ruling must be made before that measure is adopted and not after it has been adopted, on account, inter alia, of the irreversible nature of the harmful consequences. Paragraph 66 of the judgment of the Court of Justice of 6 December 2018, *IK* (C-551/18) could be construed to that effect in that the Court stated that 'as regards proceedings relating to a European arrest warrant, observance of the rights of the person whose surrender is requested falls primarily within the responsibility of the issuing Member State'. Similarly, the Court has previously ruled in a different set of preliminary ruling proceedings in relation to the referring court's doubts as to whether an arrest warrant issued should be withdrawn (judgment of the Court of 25 July 2018 in Case C-268/17, *AY*, paragraphs 26 to 29); case may be distinguished from the present case on the ground that the decision of the referring

court wishes first to withdraw the European arrest warrant and then to refer its questions in order to be able to issue a new, but certainly lawful, arrest warrant.

The first question

- 12 It is not clear from the wording of Directive 2012/13 whether a person arrested in another Member State on the basis of a European arrest warrant enjoys the rights under Article 4 of Directive 2012/13, in particular the right under Article 4(3), which by their very nature are applicable to the judicial system of the issuing Member State. On the one hand, Article 4 provides that it applies to all accused persons who are detained, without clarifying whether that has taken place on the basis of a national or European arrest warrant, meaning that there is no justification for treating them differently on the basis of that criterion. On the other hand, Article 5 provides for other rights of persons who are arrested or detained which relate directly to the execution of the European arrest warrant and are applicable only in the executing Member State. The difference between the rights under Article 4 and Article 5 is also apparent from the content of the two forms (written Letter of Rights, Annex I and Annex II): they are identical only in some respects. The question therefore arises as to whether a person arrested or detained on the basis of a European arrest warrant enjoys all the rights under Article 4, in particular the right under Article 4(3), and the rights under Article 5 of Directive 2012/13, or whether he is entitled only to the rights under Article 5, and not the rights under Article 4.
- 13 This question is raised in the light of Article 4(2) of Directive 2012/13, which stipulates that accused persons who are detained have all the rights under Article 3 and additional rights under Article 4. Article 5 does not contain such wording.
- 14 This question is also raised in light of the wording of recital 30 to Directive 2012/13. The first sentence states that rights on arrest also apply to persons arrested on the basis of a European arrest warrant. It could be inferred from that recital that they are fully entitled to the rights under Article 4. At the same time, that first sentence states that these rights should apply *mutatis mutandis*, that is to say they do not correspond in full. Moreover, the second sentence states that the rights of persons arrested on the basis of a European arrest warrant are listed in Annex II. It can be inferred from this that such persons are entitled only to the rights under Annex II, and not those under Annex I.
- 15 Such a question also arises with regard to Article 6(2) and Article 7(1) of Directive 2012/13. Specifically, if a person is arrested or detained on the basis of a European arrest warrant, is it to be assumed that the person will enjoy the right to be informed immediately of the reason for the arrest or detention and the right to be provided with all documents which are essential to challenging the arrest or detention only after having been surrendered to the issuing Member State — after the execution of the European arrest warrant?

- 16 An important argument in favour of asking these questions is the lack of appropriate amendments to Framework Decision 2002/584 which would bring it into conformity with the rights conferred by the more recent Directive 2012/13 on persons who are arrested or detained on the basis of a European arrest warrant. The lack of appropriate amendments supports the view that Directive 2012/13 does not confer any new rights on persons detained on the basis of a European arrest warrant in addition to those they already had under Framework Decision 2002/584.
- 17 Account should also be taken of the principle of equivalence, according to which a person affected by the application of EU law must not be treated less favourably than in a comparable, purely national situation. From this perspective, Article 5 of Directive 2012/13 could not be interpreted as meaning that it deprives an accused person detained on the basis of a European arrest warrant of the rights under Article 4 which that accused person would have under national law and would be able to exercise if he were arrested on the basis of a national arrest warrant in national territory. This also applies in relation to the rights under Article 6(2) and Article 7(1) of Directive 2012/13; in a national situation, these rights would be available to the person immediately upon arrest, whereas, in the case of execution of a European arrest warrant, they are available only after he is surrendered to the issuing Member State. This is because, in an identical national situation (that is to say if a person is arrested in national territory), that person would be treated as follows: he would be informed of the rights he has as an arrested person, in addition to his rights as an accused person (Article 55 NPK and Articles 72 to 74 ZMVR). In particular, he would be informed about the arrest warrant and would receive a copy of it; he would be informed about the right to challenge the detention and the right to have access to all the evidence in the case in the context of that challenge. He would have direct contact with his lawyer, including in cases where he is a state-appointed public defender. In addition, in an identical national situation, the court would send, ex officio, a copy of the indictment detailing the facts which are the subject of the charge, as well as a decision on the scheduling of a hearing, setting out in detail his rights during the trial. The arrested person, who would be informed about his rights and would be aware of the legal and factual circumstances of the detention, could thus immediately challenge the validity of his detention before the court (Article 72(4) ZMVR; Articles 65 and 270 NPK).

The second question

- 18 If the answer to the first question means that a person arrested or detained in another Member State on the basis of a European arrest warrant enjoys all the rights that he would have if he were arrested in national territory on the basis of a national arrest warrant, the referring court must enable those rights to be exercised efficiently and effectively. Thus, the best course of action would be to inform the person of his rights at the time of his arrest, when the European arrest warrant is issued (Article 11(1) of Framework Decision 2002/584). In other words, the most

logical approach would be to include his rights as a detained person in the European arrest warrant.

- 19 The second question therefore seeks an interpretation of Article 8 of Framework Decision 2002/584, in particular as to whether it can be interpreted as permitting the content of a European arrest warrant to be amended, specifically permitting the insertion of new text (in box (f), for example) in relation to the rights of the detained person before the courts of the issuing Member State, in particular with regard to challenging the national and European arrest warrants issued against him (Article 4(3) of Directive 2012/13).
- 20 The existence of such a passage of text in the European Arrest Warrant would guarantee the rights of the detained person and (as far as possible) put him in the same position that he would be in if he were arrested in national territory on the basis of a national arrest warrant.
- 21 A number of objections can be made to that legal solution.
- 22 The purpose of Framework Decision 2002/584 is to create a unified legal instrument that addresses a matter pertaining exclusively to EU law — the European arrest warrant. There are no national differences that would justify the introduction of different forms pursuant to the second sentence of Article 4(4) and the second sentence of Article 5(2) of Directive 2012/13. Therefore, the insertion of new information, other than that provided for in Article 8(1) and even other than that provided for in the Framework Decision itself (in particular the information pursuant to Directive 2012/13), in the form for the European arrest warrant would lead to the creation of different national forms for the European arrest warrant according to the national particularities of the rights of detained persons. This is contrary to the objective of the European arrest warrant as a unified legal instrument for the transfer of a person for the purposes of criminal proceedings. In this sense, point 1.3. of ‘The EAW form’ in the introduction of the Handbook on how to issue and execute a European arrest warrant (Commission notice of 28 September 2017, C[2017] 6389) states that: ‘Only this form may be used and it must not be altered.’
- 23 The European arrest warrant is a communication from the issuing judicial authority to the executing judicial authority. Its content is therefore intended to establish the requirements for surrender of the requested person. By contrast, the written Letter of Rights of the detained person pursuant to Article 4 of Directive 2012/13 is a communication from the national judicial authority to the requested person. This written letter and the provision of information pursuant to Article 6(2) and Article 7(1) of Directive 2012/13 do not relate to the execution of the European arrest warrant. This is why they do not belong in the text of the European arrest warrant.

The third question

- 24 If the Court of Justice answers the first question in the affirmative and the second question in the negative, the referring court would need to determine whether there are not other legal remedies available to guarantee that IR can effectively and efficiently exercise the rights under Directive 2012/13 immediately upon arrest on the basis of a European arrest warrant in another Member State. This means that, immediately after his arrest (or as soon as possible thereafter), IR must be informed of his rights pursuant to Article 4, in particular pursuant to Article 4(3), of the reasons for the arrest pursuant to Article 6(2) and of the access to the documents pursuant to Article 7(1) of Directive 2012/13.
- 25 A comparatively effective legal solution would be for the referring court, as soon as it becomes aware of the imprisonment of IR in another Member State, immediately to send IR the written Letter of Rights on arrest as well as a copy of the national arrest warrant and the evidence on which it is based, inform him of the details of his lawyer and, where appropriate, send him a copy of other evidence in the case at his request. These documents could be provided by issuing a European Investigation Order in accordance with Article 5 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union.
- 26 This legal solution is only effective to a certain extent for to the following reasons.
- 27 First, Framework Decision 2002/584 does not contain an obligation on the part of the executing Member State to notify the issuing Member State of the arrest of the requested person. Such notification may take place fortuitously when other circumstances are notified, for example in the case of insufficient information (Article 15(2)) or a delay in the procedure (Article 17 (4)). For this reason, the issuing judicial authority would need to make an intentional error or omission when issuing the European arrest warrant in order to ensure that it were notified by the executing judicial authority immediately after the arrest of the requested person pursuant to Article 15(2) of Framework Decision 2002/584. A deliberate breach of law (erroneously drawing up a European arrest warrant) cannot constitute a prerequisite for safeguarding the rights of the requested person. Moreover, the forwarding of information pursuant to Article 15(3) is an exception and not the rule (judgment of the Court of 23 January 2018, *Piotrowski*, C-367/16, paragraph 61).
- 28 Secondly, correspondence between the executing and issuing judicial authorities takes time — usually several days — during which the arrested person would be deprived of his rights under Directive 2012/13. This would be contrary to the obligation to respect his rights which is enshrined in recital 12 and Article 1 of Framework Decision 2002/584. Such a delay would be contrary to the obligation to guarantee the personal security of the arrested person in accordance with Article 6 of the Charter. The requirement for a reasonable period of time for the hearing of any complaint he may have would be infringed, since the mere filing of

such a complaint would be unnecessarily delayed as a result of the arrested person being informed of his rights late and the documents forming the basis of his defence being transmitted late. Such a delay would also infringe the principle of equivalence, as a person arrested on the basis of a European arrest warrant would be treated significantly less favourably than a person arrested in a purely national situation.

The fourth question

- 29 If the second or third question were to be answered in the affirmative, it would not provide a sufficiently effective guarantee because it would merely make it possible for the issuing judicial authorities to supplement the text of the European arrest warrant or to inform the detained person of his rights after being detained. There would merely be a possibility, not an obligation.
- 30 A binding obligation is also required in this respect.
- 31 A comparable obligation to issue a European Investigation Order is expressly provided for in Article 14 of Directive 2014/41. Since the rights of persons to whom a European Investigation Order is addressed are affected to a lesser extent than those of persons who are arrested or detained on the basis of a European arrest warrant, it is not acceptable for EU law to provide legal remedies only for the former and not for the latter.
- 32 In the absence of one or more legal solutions which, taken together, guarantee the proper exercise of the rights conferred by Directive 2012/13 on a person detained on the basis of a European arrest warrant, the question arises, in the light of Article 6 of the Treaty on European Union, Articles 6 and 47 of the Charter, recital 12 and Article 1(3) of Framework Decision 2002/584, as to whether the system of Framework Decision 2002/584 thus designed is valid in so far as it does not safeguard the rights conferred by Directive 2012/13.
- 33 More specifically, the question is whether the impossibility of informing a person detained on the basis of a European arrest warrant of his rights under Article 4 immediately upon arrest in the executing Member State and providing him with the necessary information pursuant to Article 6(2) and Article 7(1) of Directive 2012/13 results in a breach of the obligation to respect his fundamental rights.
- 34 It is also necessary to examine whether it is compatible with the right to liberty and security under Article 6 and the right to an effective remedy under the first paragraph of Article 47 of the Charter if, pending the decision as to whether to execute the European arrest warrant or to refuse execution, a detained person is in fact deprived of the opportunity to challenge the detention in the issuing Member State (by challenging both the national and European arrest warrant), or is significantly hindered in doing so.

35 Lastly, the question arises as to whether this mechanism of Framework Decision 2002/584, which does not guarantee the actual exercise of the rights of a detained person under Directive 2012/13 and therefore makes it difficult or impossible for the rights of a detained person to be defended before the judicial authorities of the issuing Member State, is compatible with the case-law of the Court of Justice of the European Union in relation to the defence of such rights. Accordingly, paragraph 70 of the judgment of the Court of Justice of 27 May 2019, *OG and PI* (C-508/18) and paragraph 48 of the judgment of the same date, *PF* (C-509/18) read as follows: ‘that the person in respect of whom that national arrest warrant was issued has had the benefit of all safeguards appropriate to the adoption of that type of decision, inter alia those derived from the fundamental rights and fundamental legal principles referred to in Article 1(3) of Framework Decision 2002/584’. In the case of an arrest warrant issued in absentia, the essential safeguard is the possibility of challenging the legality of the detention at an early stage. Moreover, paragraph 75 and paragraph 53, respectively, of those judgments read as follows: ‘... the proportionality of [the] decision [regarding such an arrest warrant] must be capable of being the subject ... of court proceedings which meet in full the requirements inherent in effective judicial protection’. Although paragraph 75 relates to a specific situation, the requirement of being able to challenge the arrest warrant issued, whereby that challenge has the quality of effective judicial protection, is clear. In other words, as early as during the procedure for executing the European arrest warrant, the requested person has the right to defend himself before the judicial authorities of the issuing Member State by challenging the legality of the national and European arrest warrant. In order for an arrested person actually to be able to exercise those legal possibilities recognised by the Court of Justice of the European Union, it is essential that that person is entitled to the rights under Directive 2012/13, in particular at the time referred to in that directive — the time of his arrest.

Special request

36 If the request to have Framework Decision 2002/584 declared to be invalid is successful, the referring court asks the Court of Justice to rule on whether, in view of the unavoidable difficulties that would arise in the pending proceedings relating to the execution of the European arrest warrant (paragraph 56 of the judgment of the Court of Justice of 10 November 2016 in *Poltorak*, C-452/16), it is not necessary to set a transitional period during which the legal effects are maintained.