

## AT Note

### Law

Under Austrian legislation (Section 29 of the Federal law on Judicial Cooperation in Criminal Matters with the Member States of the European Union, EU-JZG), if there is reason to initiate the tracing of a person in order to arrest him or her in at least one of the Member States, a European Arrest Warrant is ordered

- a) (exceptionally: after the formal indictment has been filed, i.e. during the trial phase) by the **court** on application of the office of public prosecution, or
- b) (in most cases, i.e. during investigations) by the **public prosecutor**, but the European Arrest Warrant must be **authorized by a court**.

The authorization by the court mentioned under b) is a prerequisite for the European Arrest Warrant to have effect. The court is the body taking the ultimate decision if the EAW is issued.

When assessing if the legal requirements are met, the court has to apply the rules enshrined in the Austrian Code of Criminal Procedure (CCP – StPO), namely on arrest (sect. 170 – 172a) and on tracing of persons (sect. 167 – 169) (because these are the national instruments underlying the issuing of a European Arrest Warrant as foreseen in sect. 29 EU-JZG). Sect. 170 para. 3 CCP explicitly holds that the arrest is not permissible if it is disproportionate to the significance of the matter; this is a special form of the general principle of proportionality, underlying the criminal procedure as a whole (sect. 5 CCP). Another general rule is that a court, when deciding on any coercive measure, has to assess all factual and legal reasons; as long as the court is not satisfied that those are met, it may instruct the investigation authorities to conduct further investigations or can conduct investigations ex officio (sect. 105 CCP).

To sum up, the court is entitled to fully assess if the legal requirements, including proportionality, to issue a European Arrest Warrant are met.

The Austrian situation (under b) therefore corresponds to the one described by the ECJ in its judgment of 27 May 2019, C-508/18, as follows:

**75** In addition, where the law of the issuing Member State confers the competence to issue a European arrest warrant on an authority which, whilst participating in the administration of justice in that Member State, is not itself a court, the decision to issue such an arrest warrant and, inter alia, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements inherent in effective judicial protection.

We therefore consider that European Arrest Warrants issued by an Austrian public prosecutor and (as demonstrated, always) authorized by a court are to be regarded as issued by a “judicial authority” in the sense of Art. 6 para. 1 of the Framework Decision 2002/584/JHA, as interpreted by the ECJ in its judgments of 27 May 2019.

### Practical aspects

Up to now, the fact that European Arrest Warrants ordered by a public prosecutor always, before being issued, have been authorized by a court, is not reflected in the Certificate.

The Austrian Ministry of Justice has issued, on June 6<sup>th</sup>, a decree asking the prosecution authorities to complement the “Certificate” (= the European Arrest Warrant) with an Annex containing the authorisation by the court.