Independence of Public Prosecutors' Offices

Recent Case Law of the CJEU on the European Arrest Warrant and its Impact on the EU Criminal Justice System

Giuseppe Ruben Grimaldi *

eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

The independence of the judiciary has been a recurrent issue in the case law of the Court of Justice of the European Union in recent years. In particular, in 2019 and 2020, in a series of new cases concerning the status of national public prosecutors, the Court examined the level of independence necessary for public prosecutors to fall within the concept of an "issuing judicial authority" within the meaning of Article 6(1) of the Framework Decision on the European Arrest Warrant. After an exposition of these cases, this article seeks to investigate the impact of this case law on the EU criminal justice system. Crucially, it is argued that the new case law is likely to change the EAW dynamics that the Member States, especially those that have conferred upon their public prosecutors' offices the power to issue EAWs, have been relying on so far and, as a consequence, the EU criminal justice system as a whole. This new framework gives rise to several practical difficulties for the executing judicial authorities that may entail, inter alia, a longer deprivation of liberty of the requested persons. A deeper reflection on this outcome is therefore also needed at the legislative level.

AUTHOR

Giuseppe Ruben Grimaldi

Lawyer Linguist
Court of Justice of the European Union

CITE THIS ARTICLE

Grimaldi, G. R. (2021). Independence of Public Prosecutors' Offices : Recent Case Law of the CJEU on the European Arrest Warrant and its Impact on the EU Criminal Justice System. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2020-028

Published in eucrim 2020, Vol. 15(4) pp 330 – 336

https://eucrim.eu

ISSN:

While the Court of Justice of the European Union ("CJEU" or "the Court") has regularly provided clarification on the scope of various provisions of the Framework Decision on the European Arrest Warrant (FD EAW)[1] since its entry into force, never had it had the chance to interpret the notion of "judicial authority", referred to in Art. 6 of the FD EAW, as extensively as it was asked to do in a series of cases in 2019 and 2020, notably as regards national public prosecutors. In particular, the Court was asked to establish criteria for determining the level of independence necessary for public prosecutors to be regarded as judicial authorities capable of issuing, and executing, an EAW.

The issue of judicial independence has undoubtedly been a *Leitmotiv* of the Court's case law in recent years. In this regard, we cannot but recall, for instance, the importance of the Court's findings in the judgments on the "Polish rule-of-law crisis."[2] In general terms, judicial independence can be defined as the ability of the judiciary to execute its duties free from the influence of, in particular, the executive power,[3] and without being driven by private interests. The simplicity of this general definition clashes, however, – as in all aspects of life, when it comes to applying a general principle in practice – with the complexity of the multifaceted reality, as will be shown in the next paragraphs dedicated to the status of national public prosecutors in various Member States with regard to the FD EAW.

I. The Concept of an 'Issuing Judicial Authority' within the Meaning of Art. 6(1) of the FD EAW

Art. 6(1) FD EAW provides that "[t]he issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue [an EAW] by virtue of the law of that State." Behind this tautological text is the lack of a real definition of the concept in question – a fact which has given rise to doubts in the national practice, leading several States to seek guidance from the CJEU to interpret that provision. The resulting case law of the Court, which in certain cases has caused strong reactions in the Member States, provides clarification as to the concept of an "issuing judicial authority." However, the Court's clarification is not without consequences: as will be exposed in section III of this article, it could entail deep changes in the national law of some Member States.

In fact, this case law first began to take shape with the rulings of 10 November 2016 in *Poltorak*, *Kovalkovas* and *Özçelik*.[4] In these cases, the CJEU clarified, in the first place, that the concept of an "issuing judicial authority" is an autonomous concept of EU law; accordingly, it cannot be left to the assessment of the Member States.[5] In the second place, the Court ruled that police services and ministries of justice cannot be regarded as "issuing judicial authorities" in the sense of Art. 6(1) FD EAW.[6] Indeed, in accordance with the principle of the separation of powers, the judiciary must be distinguished from the executive; therefore, administrative authorities or police authorities, which are placed under the hierarchy of the executive, or a ministry of justice, which is an organ of the executive, are not covered by the concept of judicial authority.[7]

II. Recent Case Law of the CJEU on the Status of National Prosecutors

As mentioned above, in 2019 and 2020, the Court of Justice was confronted with a number of requests from several Member States for a preliminary ruling about the interpretation of the concept of a "judicial authority" under Art. 6 FD EAW. This time, however, the issues raised in these cases specifically concerned the status of national public prosecutors and their level of independence.

https://doi.org/10.30709/eucrim-2020-028

1. Joined Cases C-508/18 and C-82/19 PPU (*Public Prosecutors' Offices in Lübeck and Zwickau, Germany*)

The landmark judgment of 27 May 2019 in the joined cases C-508/18 (*Public Prosecutor's Office in Lübeck*) and C-82/19 PPU (*Public Prosecutor's Office in Zwickau*),[8] delivered by the Grand Chamber of the CJEU, ushered in the case law at issue. The referring courts – in the context of two EAWs issued by two German public prosecutors' offices – asked the CJEU whether those German prosecutors could be regarded as "issuing judicial authorities" within the meaning of Art. 6(1) FD EAW, insofar as they are hierarchically subordinate to the Minister for Justice of the relevant *Land*, who may exercise, in relation to those prosecutors, directly or indirectly, an "external" power of supervision and direction, or even instruction, in connection with the adoption of a decision to issue an EAW.[9]

The Court, building on its previous findings in *Poltorak* and *Kovalkovas*, reiterated that the concept of a "judicial authority" must be understood as designating not only the judges or courts of a given Member State, but also, in a broader way, the authorities *participating* in the administration of criminal justice in that Member State, as long as they do not belong to the executive.[10] It found that this first requirement was satisfied by the German prosecutors in question, given their essential role in the conduct of criminal proceedings.

However, in order to be regarded as a judicial authority, the authority responsible for issuing an EAW must also, as a second requirement, act independently in the execution of its functions and, accordingly, must not be exposed to any risk of being subject to an instruction in a specific case from the executive. In that regard, the Court recalled the dual level of protection of procedural and fundamental rights that the person against whom an EAW has been issued must enjoy – that is, protection of these rights both when a national decision is adopted and when an EAW is issued.[11] Where this judicial protection [12] is carried out by entities that are not courts or judges, it can only be guaranteed by an institution that acts independently, without being exposed to an external power of instruction, in particular from the executive.[13] Furthermore, the decision taken by such an entity to issue an EAW, and the proportionality of that decision, "must be capable of being the subject … of court proceedings which meet in full the requirements inherent in effective judicial protection."[14]

In this case, notwithstanding the safeguards provided by German law to circumscribe the power of instruction enjoyed by the Minister for Justice to extremely rare situations, the possibility that a decision by a public prosecutor's office to issue or not to issue an EAW may be influenced by the external power of such a minister cannot be ruled out. Thus, since that second requirement is not satisfied, German public prosecutors do not fall within the concept of an "issuing judicial authority."

2. Case C-509/18 PF (*Prosecutor General of Lithuania*)

The same day of the judgment analysed above, the Grand Chamber of the CJEU, in its judgment in the similar case C-509/18,[15] found, by contrast, that the Prosecutor General of Lithuania fell within the concept of an "issuing judicial authority" under Art. 6(1) FD EAW. Indeed, that prosecutor's office participates in the administration of criminal justice in Lithuania[16] and satisfies the independence requirement as, whilst institutionally independent from the judiciary, its legal position in Lithuania affords it a guarantee of independence from the executive in connection with the issuing of an EAW, allowing it to act free of any external influence in exercising its functions.[17]

https://doi.org/10.30709/eucrim-2020-028

3. Opinions of Advocate General *Campos Sánchez-Bordona*

Advocate General *Sánchez-Bordona's* position in the two cases above was somewhat more "radical" than the one of the Court and is consistent with his position expressed in previous cases, notably *Özçelik*,[18] of which it constitutes a sort of continuation. In his Opinions, not only did the Advocate General, like the Court, exclude that the German prosecutors' offices be considered judicial authorities with the ability to issue judicial decisions such as EAWs, but he concluded that "the term 'issuing judicial authority' does not include the institution of the Public Prosecutor's Office,"[19] implying that only judges and courts are capable of issuing EAWs.[20] As a result, and unlike the Court in its subsequent findings, the AG concluded that the Prosecutor General's Office of Lithuania could not be regarded as an "issuing judicial authority" either.

In the AG's view, only courts *stricto sensu* can ensure a sufficiently high degree of independence in decisions regarding the deprivation of liberty of the person concerned for a significant amount of time[21] – as may be the case with an EAW – and are "capable of properly assessing the proportionality of issuing an EAW."[22] A public prosecutor's office, for its part, does not administer justice and lacks by its very nature "judicial independence" even if it is recognised in national law as having the status of an independent body,[23] since

> [i]n a State governed by the rule of law, this role is the exclusive responsibility of judges and courts and not of other authorities, including those which participate in the administration of justice, such as the Public Prosecutor's Office. The latter are not, like the judge, subject only to the law, are not independent to the same degree as judges, and, moreover, are always subject to the final decision of the court.[24]

This fundamental distinction between legal entities that administer justice (*ius dicunt*) and those that participate in its administration (such as the public prosecutor's office) or simply collaborate in its execution (such as the police or, in certain cases, private individuals) is specific to criminal law. It is thus important to define the limits within which these entities can act and, more importantly, to differentiate the contexts in which they act: the AG observes, for instance, that a public prosecutor's office may have a judicial nature in certain areas of criminal law cooperation, such as the taking of evidence, but this does not imply that it enjoys the same judicial nature in other matters, such as the issuing of an EAW, an act which may lead to long periods of detention.[25]

4. Joined Cases C-566/19 PPU and C-626/19 PPU (*French Public Prosecutor's Office*)

It did not take long before other national courts referred questions to the CJEU to seek clarifications concerning the independence requirement set out in the judgments in *Public Prosecutors' Offices in Lübeck and Zwickau* and *Prosecutor General of Lithuania*. In particular, questions were asked in respect of the Court's finding, at paragraph 75 of the first of these judgments, that the decision to issue an EAW "must be capable of being the subject … of court proceedings which meet in full the requirements inherent in effective judicial protection."

In joined cases C-556/19 PPU and C-626/19 PPU,[26] the referring courts had doubts as to whether French public prosecutors may be regarded as "issuing judicial authorities," insofar as, whilst independent from the executive, they are hierarchically subordinate to the Principal Public Prosecutor, who has the power to direct them. They also had doubts as to whether the fact that a court monitors compliance with the conditions for issuing an EAW, in particular its proportionality, before the actual decision of the prosecutor to issue such a warrant is adopted, satisfies the second level of judicial protection, as set out above in the analysis of the *Public Prosecutors' Offices in Lübeck and Zwickau* case.

As to the first question, the CJEU clarified that internal instructions given to public prosecutors by their hierarchical superiors, who are themselves public prosecutors, do not run contrary to the independence requirement, which prohibits only external instructions, in particular from the executive.[27]

As to the second question, the Court recalled that, where the decision to issue an EAW is taken by an entity which, whilst participating in the administration of justice in the Member State, is not a court or judge, the decision and the proportionality thereof must be capable of being the subject of court proceedings that ensure their compliance with the requirements inherent in effective judicial protection.[28] In that regard, it is for the Member States to decide which measures to apply to ensure that level of protection.

The Court found that the French system meets those requirements of effective judicial protection, as it provides for procedural rules that guarantee that the conditions for issuing an EAW and the proportionality of the EAW are subject to judicial review. Therefore, French public prosecutors fall within the notion of "issuing judicial authorities."

5. Case C-625/19 PPU (*Swedish Prosecution Authority*)

In case C-625/19 PPU,[29] the referring court asked the CJEU whether a public prosecutor's office, such as the Swedish Prosecution Authority, which acts independently from the executive and has issued an EAW, may be regarded as an "issuing judicial authority" if the *conditions* for issuing an EAW (i.e. the issuance of a provisional national arrest warrant), and the proportionality thereof, have been assessed by a judge before the actual decision of that public prosecutor to issue the EAW.

The Court found that the Swedish system meets the requirements of effective judicial protection, as it guarantees that the conditions for issuing an EAW, and its proportionality, are subject to judicial review. Indeed, according to the Swedish law, the decision to issue an EAW must be based on a decision ordering the provisional detention of the person in question. The latter decision is made by a court, which must assess the proportionality of future measures, such as an EAW. In addition, the requested person is entitled to challenge the decision ordering his provisional detention and, in the event this decision is annulled, the EAW based on it is automatically invalidated. Therefore, the Swedish Prosecution Authority also falls within the notion of "issuing judicial authorities."

6. Case C-627/19 PPU (*Belgian Public Prosecutor's Office*)

In case C-627/19 PPU,[30] the national court asked the CJEU whether a public prosecutor, such as the Belgian Public Prosecutor's Office, who acts independently from the executive and has issued an EAW, may be regarded as an "issuing judicial authority" if the legislation of that Member State does not provide a separate judicial remedy to challenge the public prosecutor's decision to issue the EAW.

As in the last two judgments above, the Court found that the Belgian system meets the requirements of effective judicial protection. However, the case at issue, unlike those referred to above, concerned an EAW issued for the purposes of executing a custodial sentence, not of conducting criminal proceedings. The EAW was therefore based on an earlier enforceable final judgment, which suggests that the person concerned had already had the benefit of effective judicial protection.

The Court, departing from the Advocate General's Opinion,[31] concluded that the FD EAW does not preclude Member States from having legislation that does not provide for a separate judicial remedy to challenge the decision of a public prosecutor to issue an EAW for the purposes of executing a sentence.

7. Case C-510/19 (*Openbaar Ministerie*)

In its recent judgment of 24 November 2020 in case C-510/19,[32] the Court dealt, this time, with the question of whether a national public prosecutor, namely the Public Prosecutor for the Amsterdam District, may be regarded as an "executing judicial authority" under Art. 6(2) FD EAW. The Court found that its case law on the concept of an "issuing judicial authority" can apply to the concept of an "executing judicial authority," since the status and nature of those authorities are identical. On this premise, it held that public prosecutors in the Netherlands cannot be regarded as "executing judicial authorities" within the meaning of the FD EAW, because they may be subject to instructions from the Netherlands Minister for Justice relating to the exercise of their functions and powers.

III. The Recent Case Law in Context: Critical Aspects and Impact on the EU Criminal Justice System

Considering the unequivocal answer of the Court in *Public Prosecutors' Offices in Lübeck and Zwickau*, the judgment in these joined cases had an immediate and direct impact.[33] The effects of the judgment were immediately the subject of discussions at the Council, within the Working Party on Cooperation in Criminal Matters (COPEN), to ascertain whether Member States were considering adopting legislative changes and whether the judgment could cause the release of requested persons in those States.

Since the vast majority of EAWs in Germany were issued by public prosecutors, that State, in particular, had to find a quick legal solution in order to remedy the fact that a large number of EAWs had suddenly become invalid. In a note, the German delegation stated at first that, acting on the basis of the Court's judgment, Germany would adjust its procedures for issuing EAWs, which "[f]rom now on … will only be issued by the courts … without [the need to change] the existing laws."[34] The German Ministry of Justice added, a few days later, that 5,300 existing EAWs were to be replaced by new warrants issued by courts.[35] This short-term choice was rather predictable, since the alternative solution – namely, a radical reorganisation of the hierarchical structure of German public prosecution offices, in which the instruction power of the executive would be suppressed and, accordingly, the entire balance of powers reformed – would have taken a much longer time.[36] Other Member States followed Germany in describing, through notes, the status of their public prosecutors' offices.[37]

The case law at issue also has an impact in those Member States in which, although the public prosecutor's office is fully independent, the national law does not provide for adequate legal remedies allowing the prosecutor's decision to issue an EAW to be challenged before a court. Such States will have to introduce legislative changes in that regard, on the understanding that, in accordance with the principle of procedural autonomy, they can choose how to ensure effective judicial protection.[38]

This new case law of the Court relating to the status of national public prosecutors is thus likely to change the EAW dynamics on which the Member States – namely, those that have conferred upon their public prosecutors' offices the power to issue EAWs – have relied to this point and, as a consequence, the EU criminal justice system as a whole. A closer exploration of this case law, however, inevitably raises the question of whether the stringent interpretation of Art. 6(1) FD EAW given by the Court actually does provide greater protection of the fundamental rights of the requested person.

The two-level protection required by the CJEU would *prima facie* suggest an affirmative answer to this question, as the issuing Member State must ensure that, even though a national arrest warrant has been issued by a court, the subsequent EAW will be issued by a fully independent entity able to guarantee effective

judicial protection of the person concerned.[39] This rigorous two-level test, which requires the issuing authorities to assess the proportionality of the EAW and fulfil precise criteria, seems therefore to provide stronger protection of the person's fundamental rights.

Yet, on the other hand, and despite the consistency of the jurisprudence developed so far by the Court in the matter, relevant practical difficulties may arise for the executing authorities. In this respect, as stated above, these authorities now have to assess whether the criteria elaborated by the Court (in relation to the status of the issuing State's public prosecutors) are satisfied; that is, they must ensure that a proportionality assessment has taken place in the issuing Member State, that its public prosecutor's office is independent, etc. Not only does this evaluation require more time, thus potentially delaying surrender,[40] but it is also difficult for an authority of another Member State to carry out. As a result, the requested person's fundamental rights may, paradoxically, be less protected and the deprivation of his liberty even longer.

In this respect, it is worth recalling the astute legal arguments advanced by Advocate General *Campos Sánchez-Bordona* in his above-mentioned Opinions in cases C-508/18, C-82/19 PPU, and C-509/18, according to which only judges and courts administer justice (*ius dicunt*) and may guarantee the level of independence necessary to adopt an act, such as an EAW, capable of depriving a person of his liberty for a significant amount of time. This approach implies that, although in certain Member States, as in Lithuania, the Public Prosecutor's Office is not subject to directions or instructions from the executive and is, in this sense, fully independent from hierarchical constraint, such an entity does not have, by its own nature, the level of independence required to issue an EAW; thus, it cannot be considered *de plano* an "issuing judicial authority." In other words, what matters is not the "functional" independence, but the specific and exclusive "judicial" independence of the entity.

Moreover, according to the AG, when it comes to assessing the independence of a public prosecutor, not only the executive's power to give *specific* instructions, but also its power to give *general* instructions is relevant,[41] as is the hierarchical subordination of public prosecutors to their superiors. In addition, he maintained that a person requested under an EAW issued by a public prosecutor must be able to challenge that EAW before a judge or court in the issuing Member State, without having to wait until he/she is surrendered.[42]

The Court did not specifically address the issue raised by the Advocate General about the difference between functional independence and judicial independence, and it confirmed its broader interpretation of the notion of a "judicial authority," in line with its previous jurisprudence (see *Poltorak*).

In sum, whereas the Court "simply" requires that an authority participating in the administration of criminal justice, such as a public prosecutor's office, be functionally independent from the executive branch in order to be regarded as a judicial authority competent to issue an EAW, the Advocate General takes the view that account must be taken not only of the existence of a "vertical" dependency relationship, but especially of the judicial function of the authority in question.

While the CJEU is certainly not required to expressly refute AGs' reasoning, it would have been interesting if it had justified in greater detail its more extensive approach, whereby entities *participating* in the administration of criminal justice, if functionally independent from the executive, are included in the notion of an "issuing judicial authority."

The difficulties explained above could also have the effect of increasing the number of references for a preliminary ruling to the Court of Justice where executing authorities do not manage to determine whether the prosecution authority of a Member State is sufficiently independent to constitute a judicial authority. Such cases would entail an even longer delay to the surrender decision and, notably, a longer deprivation of liberty of the requested person.

Admittedly, conferring the power to issue EAWs only upon courts, as is the case in some countries, could be less problematic in practice. It has the advantage that executing judicial authorities can presume – by relying on the principle of mutual trust – that the issuing authority is sufficiently independent, without the need to conduct an examination in each individual case.

Furthermore, the EAW system still suffers from flaws that the recent case law of the Court is not, *per se*, able to solve. One issue, for example, is the lack of effective implementation, in several Member States, of EU procedural rights provided for by acts of EU law, such as the right for a requested person to have access to legal assistance before surrender.[43] It is thus essential that the European institutions strictly monitor Member States' implementation of those acts, in order to ensure that requested persons are not deprived of their liberty any longer than necessary, and that their procedural rights do not remain a dead letter.

---

1. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.* L 190, 18.7.2002, 1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, *O.J.* L 81, 21.3.2009, 24.↩
2. *Inter alia*: CJEU, 24 June 2019, case C-619/18, *Independence of the Supreme Court*; 5 November 2019, case C-192/18, *Independence of the Ordinary Courts*; 19 November 2019, joined cases C-585/18, C-624/18 and C-625/18, *Independence of the Disciplinary Chamber of the Supreme Court*. This article will not deal specifically with this series of cases, which would require a separate and thorough analysis.↩
3. The theory of the "separation of powers" is notoriously associated with the figure of the Baron de Montesquieu, and in particular with his famous treatise "*The Spirit of Laws,*" published in 1748.↩
4. CJEU, 10 November 2016, case C-452/16 PPU, *Poltorak*; 10 November 2016, case C-477/16 PPU, *Kovalkovas*; 10 November 2016, case C-453/16 PPU, *Özçelik*.↩
5. See, for example, *Poltorak*, *op. cit.* (n. 4), paras 31 and 32.↩
6. See *Poltorak*, *op. cit.* (n. 4), paras 35 and 46, and Opinion of AG Sánchez-Bordona in the same case, para. 39; *Kovalkovas*, *op. cit.* (n. 4), paras 35 and 45, and Opinion of AG Sánchez-Bordona in that case, para. 34.↩
7. Accordingly, an EAW issued by them cannot be considered a "judicial decision" within the meaning of Art. 1(1) FD EAW. Nevertheless, the confirmation by a public prosecutor's office of a national arrest warrant that had previously been issued by a police authority may be considered a "judicial decision" within the meaning of Art. 8(1)(c): see *Özçelik*, *op. cit.* (n. 4), operative part.↩
8. CJEU, 27 May 2019, joined cases C-508/18, *OG*, and C-82/19 PPU, *PI* ("*Public Prosecutors' Offices in Lübeck and Zwickau*").↩
9. Under Section 147 of the *Gerichtsverfassungsgesetz* (German Courts Constitution Act), "[t]he right of supervision and direction shall lie with: 1. the Federal Minister of Justice in respect of the Federal Prosecutor General and the federal prosecutors; 2. the *Land* agency for the administration of justice in respect of all the officials of the public prosecution office of the *Land* concerned; 3. the highest-ranking official of the public prosecution office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecution office of the given court's district."↩
10. *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit*. (n. 8), para. 50.↩
11. "… since, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision", *ibid*., para 67; see also CJEU, 1 June 2016, case C-241/15, *Bob-Dogi*, para. 55.↩
12. It was noted that the Court, stating in paragraph 72 that judicial protection has to be ensured also at the second level, "backtrack[ed] somewhat from its previous statement (para 68)," according to which the requirements inherent in effective judicial protection should be adopted at least at one of the two levels of that protection: see in this sense K. Ambos, "The German Public Prosecutor as (no) judicial authority within the meaning of the European Arrest Warrant: A case note on the CJEU's judgment in OG (C-508/18) and PI (C-82/19 PPU)", (2019) 10(4), *New Journal of European Criminal Law*, 399, 401. In reality, this is not a contradiction: those statements of the Court must be read as simply requiring that a *judge or court* intervene at least at the first level, *and*, where the authority competent to issue the subsequent EAW (second level) is not a judge but a prosecutor, this authority has to be fully independent and ensure that the decision to issue an EAW is proportionate. The proportionality of that decision, as will be explained in the following cases, could also be reviewed, before the decision itself is finalised, by the court that adopted the national arrest warrant, while a subsequent and separate remedy is just one of the options Member States can provide for in their national law.↩
13. The fact that, as is the case in Germany, a national arrest warrant is issued by a judge (first level), and thus the subsequent EAW is based on a national decision that has already been "checked" by an independent institution, does not suffice to satisfy the independence requirement, as, at the second level, the judicial authority must assess the proportionality of the decision to issue an EAW, which requires that the authority in question be fully independent; see *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 8), paras 71-73. See also C. Heimrich, "European arrest warrants and the independence of the issuing judicial authority – How much independence is required? (Case note on joined cases C-508/18 and C-82/19 PPU OG and PI)", (2019), 10(4), *NJECL*, 389, 397.↩
14. *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit*. (n. 8), para. 75.↩
15. CJEU, 27 May 2019, case C-509/18, *PF* (*Lithuanian Prosecutor General's Office*).↩
16. *Ibid*., paras 40-42.↩
17. *Ibid*., para. 55 and operative part.↩
18. CJEU, 19 October 2016, Opinion of AG Sánchez-Bordona in case C-453/16 PPU, *Özçelik*.↩
19. See AG Sánchez-Bordona, Opinion of 30 April 2019 in case C-508/18, *Public Prosecutors' Offices in Lübeck and Zwickau*, conclusion.↩
20. See *ibid*., para. 57.↩

21. *Ibid*., paras 61 and 84. The AG, recalling his opinion in *Özcelik*, *op. cit.* (n. 18), stated that a public prosecutor may, when they adopt a national arrest warrant, be regarded nevertheless as an authority that issues a "judicial decision" for the purpose of Art. 8(1)(c) of the Framework Decision, insofar as the prosecutor's decision in the given case will be checked and reviewed by a judge or court within a very short period of time (see, in particular, *ibid*., paras 50 and 62). In the specific case at issue, however, since German public prosecutors are not even entitled to issue national arrest warrants (which can be issued only by courts), it is the view of the AG that it would be paradoxical to allow these public prosecutors to issue an EAW, which could entail a much longer deprivation of liberty (see para. 76).↩
22. *Ibid*. para 71. The AG referred in this respect to the Opinion of AG Bot of 3 March 2016 in case C-404/15, *Aranyosi and Căldăraru*, paras 137 et seq.↩
23. AG Sánchez-Bordona, Opinion of 30 April 2019 in case C-509/18, *Lithuanian Prosecutor General's Office*, paras 21 and 22.↩
24. Opinion in *Public Prosecutors' Offices in Lübeck and Zwickau*, *op. cit.* (n. 19), para. 67.↩
25. *Ibid*. paras 39-44.↩
26. CJEU, 12 December 2019, joined cases C-566/19 PPU and C-626/19 PPU, *French Prosecutor's Office*.↩
27. *Ibid*., para. 56.↩
28. *Ibid*., paras 63 and 64.↩
29. CJEU, 12 December 2019, case C-625/19 PPU, *Swedish Prosecution Authority*.↩
30. CJEU, 12 December 2019, case C-627/19 PPU, *Belgian Public Prosecutor's Office*.↩
31. According to AG Sánchez-Bordona, "in order to issue an EAW, the existence of a NAW or, as in the case here, of a final judgment imposing a custodial sentence, is not the only prerequisite. It is also a requirement that the issue of the EAW should not be disproportionate. And the examination of proportionality is a matter for the courts …"; accordingly, "[EAWs] issued by the Prosecution Authority for the purposes of enforcing a custodial sentence imposed by an enforceable decision must be capable of being the subject of court proceedings similar to those that apply in the case of [EAWs] issued for the purposes of conducting a criminal prosecution", see AG Sánchez-Bordona, Opinion of 26 November 2019 in case C-627/19 PPU, *Belgian Public Prosecutor's Office*, paras 24, 26 and conclusion.↩
32. CJEU, 24 November 2020, case C-510/19, *Openbaar Ministerie*.↩
33. See also T. Wahl, "CJEU: German Public Prosecution Office is not a 'Judicial Authority' in the EAW Context", (2019) *eucrim*, 31, 33.↩
34. The text of this note is available at: <https://www.ejn-crimjust.europa.eu/ejnupload/News/WK-6666-2019-INIT.PDF> (accessed on 24 January 2021).↩
35. See <https://data.consilium.europa.eu/doc/document/ST-9974-2019-ADD-1/en/pdf> (accessed on 24 January 2021).↩
36. A draft law to strengthen the independence of the public prosecutor's office (*Gesetzentwurf: Entwurf eines Gesetzes zur Stärkung der Unabhängigkeit der Staatsanwaltschaft (Drucksache 19/11095)*) is currently being discussed by the German *Bundestag*.↩
37. For example, Italy stated that the Italian Constitution "excludes Public Prosecutors from the sphere of influence of the executive power" and that they enjoy maximum independence, in compliance with the principle of separation of powers. Similarly, Sweden stated that Swedish prosecutors are not exposed to the risk of being subject to directions or instructions from the executive and that, therefore, their competence to issue EAWs is not affected by the Court's ruling in *Public Prosecutors' Offices in Lübeck and Zwickau*. These notes are available at: <https://data.consilium.europa.eu/doc/document/ST-9974-2019-INIT/en/pdf> and <https://data.consilium.europa.eu/doc/document/ST-9974-2019-ADD-1/en/pdf> (accessed on 24 January 2021). It is also worth mentioning the "Questionnaire on the CJEU's judgments in relation to the independence of issuing judicial authorities and effective judicial protection" drafted by Eurojust to illustrate the current legal situation in each Member State, available at: <https://www.eurojust.europa.eu/questionnaire-cjeus-judgments-relation-independence-issuing-judicial-authorities-and-effective> (accessed on 24 January 2021).↩
38. See, in that regard, 53rd Plenary meeting of the European Judicial Network - Conclusions on current developments on the application of the EAW, p. 9, available at: <https://data.consilium.europa.eu/doc/document/ST-14503-2019-INIT/en/pdf> (accessed on 24 January 2021).↩
39. The effects of the two arrest warrants are indeed different: an EAW may result in the person's surrender to a Member State with which that person usually has no links of any kind, whereas a national arrest warrant does not entail such a surrender. Accordingly, the assessments behind these acts are not the same.↩
40. See T. Wahl, "Lithuanian Prosecutor General Included in the Concept of "Judicial Authority" in the FD EAW", (2019) *eucrim,* 34.↩
41. In that respect, the AG recalled the Court's findings in *LM* (25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality*), according to which an issuing judicial authority "exercises its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever" (*LM*, para. 63); see AG Sánchez-Bordona, Opinion of 26 November 2019 in joined cases C-566/19 PPU and C-626/19 PPU, *French Prosecutor's Office*, para 37.↩
42. *Ibid*., conclusion.↩
43. L. Baudrihaye-Gérard, "Can Belgian, French and Swedish prosecutors issue European Arrest Warrants? The CJEU clarifies the requirement for independent public prosecutors", *EU Law Analysis*; available at: <http://eulawanalysis.blogspot.com/2020/01/can-belgian-french-and-swedish.html> (accessed on 24 January 2021).↩

Author statement

The views expressed in this article are solely those of the author and do not necessarily reflect the views of his employer.

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union