



ARTICLES

TOWARDS EUROPEAN CRIMINAL PROCEDURAL LAW – FIRST PART

edited by Araceli Turmo

WHY IS A REDEFINITION OF THE AUTONOMOUS CONCEPT OF AN “ISSUING JUDICIAL AUTHORITY” IN EUROPEAN ARREST WARRANT PROCEEDINGS NEEDED?

ARIADNA H. OCHNIO*

TABLE OF CONTENTS: I. The importance of defining the concept of an “issuing judicial authority”. – II. The unclear purpose of modifying the definition of an “issuing judicial authority” in the second draft Framework Decision on the EAW – III. The broad concept of an “issuing judicial authority” in the case law of the Court of Justice. – IV. The consequences of the case law of the Court of Justice. – V. Final remarks.

ABSTRACT: Defining the concept of an “issuing judicial authority” in European Arrest Warrant (EAW) proceedings is one of the starting points for formulating the principles of effective judicial protection in emerging “European criminal procedure”. There is no potential for this concept to be homogeneous for all instruments of cross-border cooperation in criminal matters, as the EAW mechanism may result in consequences for the individual incomparably more severe than other instruments. The uniqueness of the EAW mechanism has not yet been properly addressed, both by EU legislative policy and in the jurisprudence of the Court of Justice. Given the deficiencies of effective judicial protection of the individual at the stage of issuing the EAW, the principle of mutual recognition seems to have taken too much priority in the approach adopted. The EAW procedure should be more individual-centred at the initial stage, otherwise the national courts executing an EAW will face an ongoing problem with imperfect assessment of the qualities necessary for an “issuing judicial authority”. Removing the concept of an “issuing judicial authority” from the procedural autonomy of Member States, and placing it within the scope of the EU’s minimum standards on effective judicial protection of the individual could be helpful in solving this problem.

KEYWORDS: issuing judicial authority – European Arrest Warrant – judicial protection of the individual’s rights – cross-border cooperation in criminal matters – principle of mutual recognition – European criminal procedure.

* Assistant Professor, Institute of Law Studies, Polish Academy of Sciences (Warsaw), ariadnaochnio@gmail.com.



I. THE IMPORTANCE OF DEFINING THE CONCEPT OF AN "ISSUING JUDICIAL AUTHORITY"

The concept of an "issuing judicial authority" in the European arrest warrant (EAW) procedure has an impact on judicial protection of an individual's rights in cross-border criminal proceedings, because its understanding determines the scope of procedural autonomy of a Member State in choosing a state authority entitled to issue an EAW.¹ The attributes of judicial authority are required to enable the case to be examined in an independent and impartial manner. Depending on the interpretation of the concept of an "issuing judicial authority", the decision to issue an EAW may either be taken by a strictly judicial authority, *i.e.* a court having all the attributes of a judicial authority, or by a judicial authority in a broader sense, for example a prosecutor having some attributes of judicial authority. The latter interpretation is applied in the Court of Justice's case law.

The purpose of this *Article* is to answer the question of whether the broad interpretation of the concept of an "issuing judicial authority" is correct, and if not, what are the reasons for adopting a narrow interpretation of this concept, limiting its understanding to strictly judicial authorities? This is all the more important, because determining the correct meaning of this concept is one of the starting points for formulating the principles of judicial protection of an individual's rights in emerging "European criminal procedure". The scope of this *Article* is limited to considerations of the concept of "judicial authority" within the meaning of the "issuing judicial authority" referred to in Art. 6, para. 1, of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.² This issue will be examined in two research layers. The first is a layer of EU legislative policy. In order to determine whether the development of the concept of an "issuing judicial authority" was preceded by an in-depth analysis, the legislative path for the adoption of Framework Decision 2002/584 will be analysed. The second layer is the case law of the Court of Justice. In order to assess whether the minimum attributes of an "issuing judicial au-

¹ Judicial protection exists on two levels: at the level of issuing the national arrest warrant, and at the level of issuing the European arrest warrant; see Court of Justice, judgment of 1 June 2016, case C-241/15, *Bob-Dogi*, paras 55-57. See also S. PRECHAL, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, 2017, Vol. 2, No 1, www.europeanpapers.eu, p. 80 *et seq.*; A.P. VAN DER MEI, *The European Arrest Warrant System: Recent Developments in the Case Law of the Court of Justice*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 884; L. MANCANO, *European Arrest Warrant and Independence of the Judiciary. Evolution or Revolution?*, in *Diritti Comparati*, 2 September 2019, www.diritticomparati.it.

² Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

thority” in a broad sense are sufficient for an independent and impartial examination of the case, representative positions of the Court on this concept will be analysed.

II. THE UNCLEAR PURPOSE OF MODIFYING THE DEFINITION OF AN “ISSUING JUDICIAL AUTHORITY” IN THE SECOND DRAFT FRAMEWORK DECISION ON THE EAW

The legislative path preceding the adoption of Framework Decision 2002/584 raises doubts about defining the concept of an “issuing judicial authority” in a thoughtful and reasoned manner, because there were two versions of the draft framework decision, with significantly different determinations of this concept, and at the same time the legislative process does not reflect the purpose of modifying the determination of this concept in the second version of the draft (which is close to the concept finally adopted in Framework Decision 2002/584). The purpose of this section is to show that failure to present the justification for the modification of the definition in the legislative process gives room for adopting different interpretations of the concept, depending on the assessment of the purpose of the change, which can be assessed as tending to either narrow or expand the understanding of the concept of an “issuing judicial authority”. Nevertheless, EU legislative policy supports the procedural autonomy of Member States to determine an “issuing judicial authority”. And only based on this policy position can it be assumed that the purpose of the modification was not, however, to narrow the concept, but at a minimum to not close the possibilities for broad interpretation that could develop in the future practice of the EAW.

The original version of the proposal was submitted by the Commission on 19 September 2001.³ According to Art. 3, let. b), “issuing judicial authority” meant: “the judge or the public prosecutor of a Member State, who has issued a European arrest warrant”. A similar definition was proposed in Art. 3, let. c), for the expression “executing judicial authority” that meant: “the judge or the public prosecutor of a Member State in whose territory the requested person sojourns, who decides upon the execution of a European arrest warrant”. The proposal for a Council Framework Decision on the EAW from the first version was in favour of the procedural autonomy of the Member States as to the choice of the state entity authorised to issue the EAW. As indicated in Art. 4, let. a), Member States were to be entitled to designate, according to their national law, the judicial authorities competent to issue the EAW.

The explanatory memorandum accompanying the Proposal, in the commentary concerning Art. 3, let. b), only attempts to clarify the expression “issuing judicial authority” by pointing to its similarity to the expression “competent authorities” used in the Eu-

³ Commission Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 final.

European Extradition Convention of 13 December 1957.⁴ Art. 1 of this Convention uses the term “competent authorities” whose explanation can be found in the Explanatory Report to this Convention. According to this Report, the term “competent authorities” includes “the judiciary” and “the Office of the Public Prosecutor”. Only “the police authorities” were explicitly indicated as being outside the scope of the conventional term “competent authorities”.⁵

Despite the reference to the 1957 European Extradition Convention, the explanatory memorandum to the proposal for a Council Framework Decision on the EAW makes it difficult to interpret the expression “issuing judicial authority”, because at the same time it associates the EAW mechanism with “the principle of mutual recognition of court judgment” and “court-to-court relations between judicial authorities”.⁶ Through such wording, one gets the impression that the issue of the EAW is intended to be reserved for the strictly judicial authorities. The justification in this respect did not change during the legislative process. This is important because the concept of an “issuing judicial authority” (*sensu largo*) finally adopted in Framework Decision 2002/584 is close to that which has not been substantiated.

Examination of the legislative procedure for adopting the Framework Decision on the EAW does not allow identification of the motives for the redefinition of the term “issuing judicial authority” in the second version of the draft framework decision. The second version contains a different meaning of the term, and a different scheme of the provisions. As a result of the legislative work of various EU internal bodies, the corrected version of the text was sent to the Council by the Permanent Representative Committee and annexed to the “interinstitutional file” of 4 December 2001.⁷ The determination of the authorities competent to issue the EAW in the second version of the draft has been transferred to Art. 6, para. 1, and amended by removing the public prosecutor from its wording. According to this version: “the issuing judicial authority shall be the judicial authority of the issuing State which is competent to issue an arrest warrant by virtue of the law of the issuing State”. After the Presidency stated on 6 December 2001 that this version of the draft was approved by the delegations, the amended text was annexed to “the outcome of the proceedings” of 10 December 2001 and submitted to the European Parliament for reconsultation.⁸

⁴ Council of Europe, 1957 European Convention on Extradition.

⁵ Council of Europe, Explanatory Report to the European Convention on Extradition of 13 December 1957.

⁶ Proposal for a Council Decision COM(2001) 522 final, cit., p. 7.

⁷ Permanent Representatives Committee, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, Interinstitutional File 2001/0215 (CNS) of 4 December 2001, data.consilium.europa.eu.

⁸ Council, Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between Member States, Interinstitutional File 2001/0215 (CNS) of 10 December 2001, data.consilium.europa.eu.

The meaning of the expression "issuing judicial authority" in the final version of Framework Decision 2002/584 is close to the one proposed in its second draft of 10 December 2001. According to Art. 6, para. 1: "The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State". What draws attention is the reference to "European arrest warrant" instead of the generally understood "arrest warrant" and maintaining the approach supporting the procedural autonomy of the Member States as to the choice of the state entity authorised to issue the EAW.

The insufficiently substantiated amendment of the term "issuing judicial authority" during the legislative procedure by removing the public prosecutor from its wording makes its meaning difficult to interpret and makes it difficult to understand the assumptions of the whole concept of "judicial authority". The incomprehensibility of reasons for the redefinition of the term "issuing judicial authority" opens divergent interpretative paths, as it seems, depending on the adopted assumptions about the primary goals of the EAW mechanism. The problem boils down to whether the definition of "issuing judicial authority" has been expanded or narrowed by excluding one entity from its wording, *i.e.* the public prosecutor. The explanatory memorandum to the proposal for a Council Framework Decision on the EAW has not been modified simultaneously with the changes to its second version in question and only applies to the first version of the draft in this respect. In view of these factors, it should be recognised that the EU legislative policy developing the concept of "issuing judicial authority" is affected by lack of a clear explanation of policy objectives and lack of proper justification for how to achieve them.

The legislative procedure for adopting Framework Decision 2002/584 was executive and the determination of the judicial authority competent to issue an EAW may have caused controversy during the legislative work. This hypothesis is indirectly confirmed for example by the Sixteenth Report of 26 February 2002 of the UK Select Committee appointed to consider European Union documents and other matters relating to the European Union, which expressed concern over the absence of a reference to Arts 5 and 6 of the European Convention of Human Rights in the text of the Framework Decision on the EAW. The report contains a recommendation to the UK government that this issue should be clearly regulated in this Framework Decision. The cited report states: "It may, by virtue of Article 1(3) of Framework Decision, be *implicit* that the national authorities can apply any relevant provision of the ECHR. If so, a court in the executing State could refuse execution of a warrant where, for example, it believed the individual concerned would not receive a fair trial in the issuing State (Art. 6 European Convention of Human Rights) or the request came from a 'judicial authority' not possessing the degree of independence needed to satisfy Article 5 ECHR. We proposed to

the Government that the Framework Decision should make this *explicit*.⁹ However, the UK government did not accept to make any further amendment to the text of the Framework Decision on the EAW.

These circumstances only allow for the assumption that the change of definition of “issuing judicial authority” in the second version of the draft was the result of an unofficial political compromise, even if so, it is not reflected in the documents published in the legislative process preceding the adoption of Framework Decision 2002/584. Therefore, a hypothesis, that the concept of an “issuing judicial authority” was not well thought out in the legislative policy and is not the result of a conscious political compromise in this field, is also likely.

Difficulties in interpreting the concept of an “issuing judicial authority” are also reflected in the recent case law of the Court of Justice, but the Court is not alone in encountering difficulties. One example of such interpretation difficulties is the judgment of the Supreme Court of the United Kingdom of 30 May 2012 in *Assange v. The Swedish Prosecution Authority*.¹⁰ The UK Supreme Court eventually adopted a broad definition of judicial authority, but it was preceded by considerable interpretation problems reflected in the reasoning of that judgment. This case concerned the possible invalidity of the EAW as a result of its issuing by a non-judicial authority (the Swedish Prosecution Authority) in the context of the narrow understanding of the term “judicial authority” in the Extradition Act (2003).¹¹ In examining the meaning of the concept of a “judicial authority” in Framework Decision 2002/584, the UK Supreme Court began from the natural meaning, then passed through a teleological interpretation and examined the historical background. However, in the end the judgment was not issued unanimously (without sharing the appellant’s position).¹² Despite different domestic laws, the UK Supreme Court finally adopted a broad definition of judicial authority, but by reference to a general rule of interpretation in Art. 31, para. 3, let. b), of the 1969 Vienna Convention on the Law of Treaties.¹³ The interpreta-

⁹ UK Parliament, Sixteenth Report by the Select Committee on European Union, *The European Arrest Warrant*, 26 February 2002, publications.parliament.uk.

¹⁰ UK Supreme Court, judgment of 30 May 2012, *Assange v. The Swedish Prosecution Authority*, [2012] UKSC 22, paras 14-15, 245-248 and 266.

¹¹ Section 2, para. 2, of the Extradition Act 2003, see www.legislation.gov.uk.

¹² Cf. A. ERBEŽNIK, *Mutual Recognition in EU Criminal Law and Fundamental Rights – The Necessity for a Sensitive Approach*, in C. BRIÈRE, A. WEYEMBERGH (eds), *The Needed Balances in EU Criminal Law: Past, Present and Future*, Oxford, Portland: Hart, 2017, p. 185 *et seq.*; M. PLEIĆ, *Challenges in Cross-border Transfer of Prisoners: EU Framework and Croatian Perspective*, in D. DUIĆ, T. PETRAŠEVIĆ (eds), *EU Law in Context – Adjustment to Membership and Challenges of the Enlargement*, Osijek: Josip Juraj Strossmayer University of Osijek, 2018, pp. 387-388; opinion of AG Campos Sánchez-Bordona delivered on 30 April 2019, case C-509/18, *PF (Prosecutor General of Lithuania)*, paras 40-46.

¹³ See Art. 31, para. 3, let. b), of the 1969 Vienna Convention on the Law of Treaties. The judgment in *Assange v. The Swedish Prosecution Authority*, *cit.*, received some critical remarks in the literature, see for example: E. BJORGE, *Domestic Application of the ECHR. Courts as Faithful Trustees*, Oxford: Oxford University Press, 2015, p. 99.

tion of the treaty, according to this convention, should take into account the context, together with any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The practice of participation of non-judicial authorities in the EAW procedure was illustrated in the Section 3.1. of the Final report on the fourth round of mutual evaluations.¹⁴

Interpretative difficulties were also raised in the European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant.¹⁵ The European Parliament signalled the problem of “the lack of a definition of the term ‘judicial authority’ in Framework Decision 2002/584/JHA and other mutual recognition instruments, which has led to a variation in practice between Member States causing uncertainty, harm to mutual trust, and litigation”.¹⁶

According to the recommendations annexed to the cited Resolution concerning the validation procedure for EU mutual legal recognition instruments, the term “issuing authority” shall be defined as: “a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned” or “any other competent authority as defined by the issuing Member State, provided that the act to be executed is validated, after examination of its conformity with the conditions for issuing the instrument, by a judge, court, investigating magistrate or a public prosecutor in the issuing Member State”.¹⁷ What draws attention is that the Resolution recommends using a broad definition of an “issuing authority” in a uniform manner throughout “EU criminal legislation”, without recognising the EAW procedure as requiring a special, narrow definition.

The cited Resolution shows that the specificity of the EAW mechanism, when compared against the background of other EU instruments of mutual cooperation in criminal matters, has not been duly considered. None of the instruments of EU cooperation in criminal matters (like a European investigation order, or mutual recognition of freezing orders and confiscation orders) leads to such a serious limitation of the individual's fundamental rights as the application of an EAW.¹⁸ Therefore, the definition recommended by the European Parliament is not structured to cope with the interpretative problems signalled in this *Article*. The Commission in response did not share the Euro-

¹⁴ Final report on the fourth round of mutual evaluations – The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States, 28 May 2009, www.eumonitor.eu.

¹⁵ See European Parliament Resolution P7_TA(2014)0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant, Section F, para. vi, and Annex.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Cf. the significantly different definition of “issuing authority” in Art. 2, let. c), of Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, and in Art. 8 of the Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

pean Parliament's opinion on the need to improve the EAW mechanism through changes in EU law, *i.e.* within the Framework Decision on the EAW itself or together with other instruments of mutual recognition. In the opinion of the Commission, the problem of the lack of a common definition of "judicial authority", as identified by the European Parliament, should instead be solved by improvements in "the practical implementation and operation" of the EAW.¹⁹ Assessing the Commission's position from the point of view of problems that have recently emerged (after the set of cases of 27 May 2019 before the Court of Justice), such pathways for solving problems have proved ineffective.

A comprehensive picture of the legislative procedure for adopting the Framework Decision on the EAW shows one consistent position of EU policy in this area: respect for the procedural autonomy of Member States as to the choice of the state entity authorised to issue the EAW. However, such an approach does not simplify interpretation of the term "issuing judicial authority" at all, as one might suppose. The Member States' differing approaches to understanding this concept have made it difficult to cooperate in cross-border criminal matters, since in the EAW procedures the executing national courts began to submit requests for preliminary rulings to the Court of Justice questioning whether a non-strictly judicial issuing authority is "competent" to issue a warrant in the light of EU law (see section III of this *Article*).

Therefore, it is worth shifting the considerations from the level of the existing state of affairs to the level as it should be. Are there any arguments in favour of limiting the procedural autonomy of Member States as to the choice of the "judicial authority" entitled to issue the EAW? Assuming that among all EU instruments of cross-border cooperation in criminal matters, the EAW mechanism may result in the most serious consequences for the individual: a deprivation of liberty for an extended period,²⁰ strengthening judicial protection at the initial stage of issuing an EAW is an argument in favour of narrow interpretation of the concept of an "issuing judicial authority" in EU law. Long-term cooperation under the EAW mechanism has revealed differences in the understanding of this concept in the law of the Member States, which negatively affected mutual cooperation in this field. This circumstance constitutes an argument for reserving the competence to issue an EAW to strictly judicial authorities. Such a reservation of competences can be seen as a desirable added value in EU law standards relating to the EAW procedure, allowing for

¹⁹ Follow up to the European Parliament resolution P7_TA-PROV(2014)0174 of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, on file with the Author.

²⁰ For a period of 120 days adding up the maximum time limits for the decision to execute the EAW (Art. 17, paras 3 and 4, of Framework Decision 2002/584, *cit.*) and time limits for surrender of the person (Art. 23, paras 2 and 4, of Framework Decision 2002/584, *cit.*), and in exceptional cases also for a longer period. See the remarks on the length of pre-trial detention: P.H. VAN KEMPEN, *Pre-Trial Detention in National and International Law and Practice: A Comparative Synthesis and Analyses*, in P.H. VAN KEMPEN (ed.), *Pre-Trial Detention: Human Rights, Criminal Procedural Law and Penitentiary Law, Comparative Law*, Cambridge, Antwerp, Portland: Intersentia, 2012, pp. 20-23.

overcoming inter-state differences in the interpretation of the term “issuing judicial authority” and strengthening the procedural position of the individual.

Given the separation of powers in states governed by the rule of law, a court gives the best systematic guarantees for the attribute of independence, as required when deciding whether to limit the freedom of an individual for a longer period of time. But not only is the quality of independence important, the attribute of impartiality cannot be omitted. Impartiality cannot be required of non-judicial entities, in particular those who act as parties in a criminal trial, such as public prosecutors pursuing interests arising from their procedural position different from that of the court.²¹

Staying on considerations relating to *lege ferenda*, the rationale for redirecting EU law to a narrow interpretation of the concept of an “issuing judicial authority” is the severity of the potential consequences of the EAW mechanism for the individual. The autonomy of the concept of “judicial authority” in the field of the EAW mechanism should be considered exceptional and justified by special reasons. The signalled lack of potential for this concept to be homogeneous across all EU instruments of cross-border cooperation in criminal matters results from the uniqueness of the EAW mechanism. It should be remembered that extending the modified concept of an “issuing judicial authority” to other EU cooperation instruments could weaken the current state of multifaceted cooperation in criminal proceedings (for example in the field of the mutual recognition of freezing orders and confiscation orders, or a European investigation order). The principle of mutual recognition is a factor conditioning this cooperation. Its importance was emphasized in recital 6 of Framework Decision 2002/584: “The European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the ‘cornerstone’ of judicial cooperation”.²²

III. THE BROAD CONCEPT OF AN “ISSUING JUDICIAL AUTHORITY” IN THE CASE LAW OF THE COURT OF JUSTICE

The case law of the Court of Justice concerning the concept of an “issuing judicial authority” in the EAW procedure is in accordance with the 1957 European Extradition Convention, which was a prototype of the significance of the concept of an “issuing judicial authority”, because it includes prosecution authorities in this concept and excludes police authorities. In addition, it excludes executive authorities. The Court’s approach, to give a general overview, can be described as “prudential”, because it is highly in favour of maintaining

²¹ Noteworthy references to the impartiality of the issuing authority can be found in the judgment of UK Supreme Court, *Assange v. The Swedish Prosecution Authority*, cit., paras 5, 37, 102, 105, 117, 119, 221, 234 and 240 and opposite comments: paras 148 and 223.

²² See also L. KLIMEK, *European Arrest Warrant*, Cham: Springer, 2015, p. 68. The Author indicates this principle as “a major principle of the surrender procedure”.

wide mutual recognition of the EAW, while at the same time being insufficiently focused on the rights of the individual at the stage of issuing the warrant. The latter perspective seems to be more desirable at the initial stage of an EAW procedure, in the context of effective judicial protection of the individual. The open question is whether the Court's approach corresponds with EU legislative policy concerning the concept of an "issuing judicial authority". As indicated in the previous section, policy in this regard has certain deficiencies, which cause interpretative difficulties that can be reduced to a straightforward question: does the authority entitled to issue an EAW cover only judicial ones in the strict sense, or does it also extend to other authorities participating in the administration of justice, in the broader sense? In addition, there is some doubt whether, given the extensive autonomy of the Member States to determine the "judicial authority" competent to issue the EAW, one can still talk about the autonomous concept of EU law, *i.e.* the concept whose meaning and scope defines EU law. An analysis of the Court's representative positions can lead to the conclusion that the current approach restrains too little of Member States' autonomy in choosing the authority competent to issue an EAW.

To illustrate the position taken by the Court of Justice on the necessary qualities of the "issuing judicial authority" in EAW proceedings, the set of cases of 10 November 2016: *Poltorak*,²³ *Kovalkovas*²⁴ and *Özçelik*²⁵ is representative. The next chapter in the Court's case law on this issue is the set of cases of 27 May 2019: *PF (Prosecutor General of Lithuania)*²⁶ and the joined cases *OG and PI*.²⁷ Afterwards, the Court expressed significant positions in *NJ (Parquet de Vienne)* of 9 October 2019²⁸ and in the triad of cases of 12 December 2019: *XD*,²⁹ *ZB*³⁰ and the joined cases *JR and YC*.³¹

The Court of Justice ruled in *Poltorak* that the term "judicial authority", within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, is an autonomous concept of EU law. The request for a preliminary ruling had been made by the District Court in Amsterdam in the proceedings relating to the execution of the EAW. According to the Court of Justice, Art. 6, para. 1, must be interpreted as not including a police service (in this case it was the Swedish National Police Board).³² In the Court's assessment, an EAW issued by the police service for execution of a judgment imposing a custodial sentence cannot be regarded as a "judicial decision", within the meaning of Art. 1, para. 1, of

²³ Court of Justice, judgment of 10 November 2016, case C-452/16 PPU, *Poltorak*.

²⁴ Court of Justice, judgment of 10 November 2016, case C-477/16 PPU, *Kovalkovas*.

²⁵ Court of Justice, judgment of 10 November 2016, case C-453/16 PPU, *Özçelik*.

²⁶ Court of Justice, judgment of 27 May 2019, case C-509/18, *PF (Prosecutor General of Lithuania)* [GC].

²⁷ Court of Justice, judgment of 27 May 2019, joined cases C-508/18 and C-82/19 PPU, *OG and PI* [GC].

²⁸ Court of Justice, judgment of 9 October 2019, case C-489/19 PPU, *NJ (Parquet de Vienne)*.

²⁹ Court of Justice, judgment of 12 December 2019, case C-625/19 PPU, *XD*.

³⁰ Court of Justice, judgment of 12 December 2019, case C-627/19 PPU, *ZB*.

³¹ Court of Justice, judgment of 12 December 2019, joined cases C-566/19 PPU and C-626/19 PPU, *JR and YC*.

³² *Poltorak*, *cit.*, para. 52.

Framework Decision 2002/584. This ruling is in line with the known interpretation of Framework Decision 2002/584 referring to the European Extradition Convention. The Court pointed out the assisting role of central authorities, including central police services, and their inability to take over key competences in the EAW procedure (Art. 7, recital 9 of Framework Decision 2002/584).³³

In *Kovalkovas* the Court of Justice confirmed that the term "judicial authority" used in Art. 6, para. 1, of Framework Decision 2002/584 is an autonomous concept of EU law.³⁴ Similarly, the request for a preliminary ruling had been made by the Amsterdam District Court in the proceedings relating to the execution of the EAW. The Court of Justice adopted the interpretation that "an organ of the executive" is excluded from the meaning of the term "judicial authority". The EAW under consideration was issued by the Ministry of Justice of the Republic of Lithuania for execution of a court judgment imposing a custodial sentence. The Court took into account that supervision over the observance of the conditions of the EAW and discretion regarding its proportionality falls within the competence of this Ministry. In the Court's assessment, an EAW issued by such an authority cannot be regarded as a "judicial decision", within the meaning of Art. 1, para. 1, of Framework Decision 2002/584. The interpretation adopted in this ruling, as in the previous one, strengthens the starting position of the individual at the stage of issuing the EAW.

In *Özçelik* the Court of Justice referred to the public prosecutor involved in the two-stage procedure for issuing the EAW. However not in the context of Art. 6, para. 1, of Framework Decision 2002/584, but in the context of Art. 8, para. 1, let. c), concerning the content and form of the EAW. The request for a preliminary ruling had again been made by the Amsterdam District Court in proceedings relating to the execution of the EAW. Although the EAW was issued by a judicial authority in a narrow sense (the District Court in Veszprém, Hungary) for the purpose of conducting prosecutions, the executing court had doubts as to the content of section b) of the form contained in the Annex to Framework Decision 2002/584 with information about the decision on which the EAW is based (the arrest warrant or judicial decision having the same effect). The reference in this section was made to the arrest warrant of the Police Department of Ajka confirmed by the decision of the Public Prosecutor's Office of Ajka. The Court of Justice took the position that: "a confirmation [...] by the public prosecutor's office, of a national arrest warrant issued previously by a police service in connection with criminal proceedings constitutes a 'judicial decision', within the meaning of that provision".³⁵ In the Court's opinion, a decision by the public prosecutor's office falls within the concept of a "judicial decision" because the public prosecutor's office (unlike the police service) is responsible for administering criminal justice in a Member State.

³³ *Ibid.*, paras 42 and 45.

³⁴ *Kovalkovas*, cit., paras 47-48.

³⁵ *Özçelik*, cit., paras 33-34.

The Court of Justice then issued judgments in two cases of 27 May 2019 directly concerning the powers of the public prosecutor in the context of Art. 6, para. 1, of Framework Decision 2002/584. The Court considered the status of the Prosecutor General of Lithuania in *PF (Prosecutor General of Lithuania)* and the status of the public prosecutor's office in Lübeck and in Zwickau (Germany) in joined cases *OG and PI*.

In *PF (Prosecutor General of Lithuania)* the Court of Justice referred to the minimum attributes that a non-strictly judicial issuing authority should have within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, to be recognised as entitled to issue an EAW. The request for a preliminary ruling had been made by the Irish Supreme Court in proceedings relating to the execution of an EAW issued by the Prosecutor General of Lithuania for the purpose of conducting prosecutions. In the opinion of the Court of Justice, the concept of an "issuing judicial authority" includes: "the Prosecutor General of a Member State who, whilst institutionally independent from the judiciary, is responsible for the conduct of criminal prosecutions and whose legal position, in that Member State, affords him a guarantee of independence from the executive in connection with the issuing of a European arrest warrant".³⁶ In *PF (Prosecutor General of Lithuania)* the Court based its view on the fact that the Prosecutor General of Lithuania is a public prosecutor, who acts independently of external influence, including from the executive.³⁷ The necessary attributes of the issuing judicial authority, that can be deduced from the judgment issued in *PF (Prosecutor General of Lithuania)*, include: independence, objectivity and participation in the administration of criminal justice.³⁸

Advocate General Campos Sánchez-Bordona, in the opinion of 30 April 2019 delivered in *PF (Prosecutor General of Lithuania)*, rightly raised the problem of the variation in the level of autonomy of the public prosecutor's offices in Member States. Adoption of the interpretation that a prosecutor may be entitled to issue an EAW if he has certain attributes of judicial authority (in the strict sense) creates an obligation for the national executing judicial authority to examine the level of his autonomy in each case regarding the execution of the EAW. The Advocate General also raised the point that examinations in this area would impact the length of the procedures and the measures involving deprivation of liberty.³⁹

In the joined cases *OG and PI* the Court of Justice adopted an interpretation of the "issuing judicial authority" within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, that excludes the public prosecutor's office of a particular Member State be-

³⁶ *PF (Prosecutor General of Lithuania)* [GC], cit., para. 57.

³⁷ *Ibid.*, para. 55.

³⁸ *Ibid.*, paras 29-30, 41-42, 56-57.

³⁹ Opinion of AG Campos Sánchez-Bordona, *PF (Prosecutor General of Lithuania)*, cit., paras 33-34. See also: opinion of AG Campos Sánchez-Bordona delivered on 30 April 2019, joined cases C-508/18 and C-82/19 PPU, *OG and PI*, para. 99, indicating the problems concerning the differentiation in terms of the institutional and functional autonomy of the public prosecutor's office in Member States.

cause of the lack of certain features of judicial authority. The request for a preliminary ruling had been made by the Supreme Court (Ireland) and the High Court (Ireland) in proceedings relating to the execution of EAWs issued by the Public Prosecutor’s Office in Lübeck and the Public Prosecutor’s Office in Zwickau (Germany) for the purposes of conducting prosecutions. According to the position adopted by the Court of Justice, the concept of an “issuing judicial authority” does not include: “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”.⁴⁰ Thus, it can be concluded that the concept of an “issuing judicial authority” includes public prosecutors’ offices which are not affected by the above exclusionary features. In the Court’s opinion, the public prosecutor’s offices in Lübeck and in Zwickau are exposed to the risk of being influenced by the executive when making their decision to issue the EAW, therefore they do not meet the requirement of independence in issuing the EAW. The judgment issued in *OG and PI* is another example, after the judgment issued in *PF (Prosecutor General of Lithuania)*, of reasoning assuming the preliminary admission of a non-judicial authority to issue the EAW and subsequent verification by the executing judicial authority of its attributes necessary to recognise its judicial character in accordance with Framework Decision 2002/584. It should be added that, in the Court’s opinion, competence to issue the EAW by a non-judicial authority requires the effective legal protection of the individual, which means ensuring that a decision on the validity of an EAW and its proportionality can be challenged in court.⁴¹

After expressing its position in the cases of 27 May 2019, the Court of Justice has considered similar requests for preliminary rulings from national courts asking about the necessary attributes of the judicial authority.⁴² It can be anticipated that there will be more similar requests, because after the ruling in joined cases *OG and PI*, the national courts acting as the “executing judicial authorities” will face a continuing problem when assessing the qualities of “issuing judicial authorities”.

The Court of Justice expanded its current interpretation of the concept of an “issuing judicial authority” in *NJ (Parquet de Vienne)*.⁴³ The request for a preliminary ruling had been made by the Higher Regional Court in Berlin, in the proceedings relating to the execution of the EAW issued by the Public Prosecutor’s Office in Vienna for the purpose of prosecuting. The prosecutorial EAW was endorsed by the Regional Court in Vi-

⁴⁰ *OG and PI* [GC], cit., paras 88-90.

⁴¹ *Ibid.*, para. 75. See also para. 67 and the judgment in *Bob-Dogi*, cit., para. 56.

⁴² See also Court of Justice, pending case C-510/19, *Openbaar Ministerie (Faux en écritures)*. The request for a preliminary ruling had been made by the Court of Appeal in Brussels (Belgium). This case concerns the public prosecutor in the Netherlands acting as the “executing judicial authority” within the meaning of Art. 6, para. 2, of Framework Decision 2002/584, cit.

⁴³ *NJ (Parquet de Vienne)*, cit.

enna. The concept of an “issuing judicial authority” was examined in the context of Art. 1, para. 1, of Framework Decision 2002/584. The Court of Justice held that a public prosecutor’s office which lacks the attribute of independence may issue a court-endorsed EAW, provided that the endorsing court has full access to the case file, which according to the Court should reflect: any specific directions or instructions, the conditions of issue and the proportionality of the EAW. The Court therefore assumed that the case file can give a full picture of the case and is sufficient to draw categorical conclusions about the independence of a non-strictly judicial issuing authority.

The next development of case law was the judgment of 12 December 2019 in joined cases *JR and YC*. The request for a preliminary ruling had been made by the Luxembourg and Netherlands courts concerning the execution of EAWs issued by the public prosecutors in Lyon and Tours (France) for the purposes of conducting criminal proceedings. The Court of Justice presented the view that public prosecutors placed under the direction and control of hierarchical superiors are covered by the concept of an “issuing judicial authority” (Art. 6, para. 1, of Framework Decision 2002/584) if their status gives them a guarantee of independence when issuing the EAW, in particular in relation to the executive power and when national law provides effective judicial protection for the individual. In the Court’s assessment, this protection in national law should provide for judicial review of the conditions for issuing the EAW and its proportionality. In this regard, the Court took into account the participation of the investigating judge (and the possibility of challenging his acts) in the two-stage procedure for issuing the EAW (Arts 131 and 170 of the French Code of Criminal Procedure). However, it is for the national court (executing the EAW) to verify the existence of effective judicial protection.⁴⁴

In terms of effective judicial protection, the Court of Justice ruled similarly in *XD*.⁴⁵ The request for a preliminary ruling concerning the public prosecutor’s office in Sweden acting as the “issuing judicial authority” (Art. 6, para. 1, of Framework Decision 2002/584) had been made by the District Court in Amsterdam for the purpose of conducting the criminal proceedings. The information from the Swedish authorities, gathered in the main proceedings, confirmed the independence of the Swedish public prosecutor’s office. In the two-step procedure for issuing the EAW, the Court of first instance in Göteborg issued the base decision for the subsequent prosecution’s decision on the EAW. In *XD*, the Court of Justice confirmed that the judicial review should cover the conditions of the EAW and its proportionality, however the existence of effective judicial protection should be assessed in the light of the entire two-stage national procedure for issuing an EAW. The decisive factor in *XD*, was that the Swedish criminal procedure guarantees the right to challenge the base decision of a strictly judicial authority on pre-trial detention. If the court order on pre-trial detention is set aside as a result of an ap-

⁴⁴ *JR and YC*, cit., paras 49, 54-58, 67 and 74.

⁴⁵ *XD*, cit., paras 39-56.

peal, the prosecutor’s decision on the EAW is automatically annulled because its issuance is based on the existence of that court order.

The purpose of the prosecutorial EAW considered by the Court of Justice in *ZB* was not to conduct prosecutions, but to enforce a custodial sentence imposed by the Court of first instance in Brussels. The EAW in question was issued by the Belgian public prosecutor’s office. In *ZB* the Court of Justice expressed the view that Framework Decision 2002/584 does not preclude national legislation which does not provide for an appeal to the court against the EAW issued by a non-strictly judicial authority, like a public prosecutor’s office, if the purpose of such a decision is to execute a sentence imposed by a strictly judicial authority, like a court.⁴⁶ The problematic element was that Belgian legislation does not provide for a separate appeal against the decision to issue the EAW. As regards the independence of the public prosecutor’s office, the referring court relied mainly on information from Belgian authorities gathered in the main proceedings. In the opinion of the Court of Justice expressed in *ZB*, the judicial review, referred to in para. 75 of the judgment in joined cases *OG and PI*, is implemented by an enforceable judgment (the EAW considered was issued to enforce the custodial sentence). It can therefore be concluded from the judgment in *ZB* that the procedural guarantees for an individual regarding the correctness of issuing the EAW are “equivalent” to the guarantees for an individual in proceedings in which a custodial sentence has been imposed. The Court of Justice did not take into account the fact that the latter proceedings considered the issue of criminal liability and that the domains of such proceedings and the EAW proceedings are separate, and each of them has procedural guarantees appropriate to their specificity. Similarly, a distinction is made between the main proceedings (on criminal liability) and enforcement proceedings (for example on the EAW to enforce the judgment), each being characterised by certain procedural guarantees. In *ZB* the loosening of the EAW procedure in terms of the individual’s guarantees was justified mainly by the purpose of the EAW, which was to enforce the court judgment.

IV. THE CONSEQUENCES OF THE CASE LAW OF THE COURT OF JUSTICE

Unfortunately, the consequences of the Court of Justice’s judgments are not a resolution to the interpretative problem, concerning whether to include or not to include the public prosecutor in the scope of the term “issuing judicial authority” within the meaning of Art. 6, para. 1, of Framework Decision 2002/584, but a transfer of this ongoing problem to the national courts. Given the specialty of the EAW in the context of other EU instruments of cooperation in criminal matters, the situation arising from the Court’s judgments of 27 May 2019 should be viewed negatively. Examination by a national court, acting as an “executing judicial authority”, of the criteria excluding the independence of the public prosecu-

⁴⁶ *ZB*, cit., paras 35-36.

tor who issued the EAW, could lengthen and distance the EAW procedure, thereby weakening the position of the individual to whom the EAW applies.

Challenges by the national courts executing the EAW to the independence of the authorities of other Member States entitled by national law to issue an EAW is a delicate matter, requiring the examination of complex systemic connections in the administration of justice, and sometimes also requiring insight into the current political situation in the country of origin of the EAW. In this regard, relying only on a dogmatic analysis of national law, the case file, and information obtained in the course of the proceedings from the government of a Member State in which the EAW was issued, cannot be regarded as sufficient. Such an assessment may be defective or impossible because of a multiplicity of factors to be examined and their dynamics. It is also unclear what tools should be involved in a judicial examination of the exclusionary features of a non-strictly judicial issuing authority. Similarly, in *LM* the Court of Justice formulated a test for assessing the status of a strictly judicial authority, but did not consider with which tools the national court should carry out this test, and whether an authority such as a court may have the appropriate tools for this examination at all.⁴⁷ Ultimately, negative findings constitute a risk of creating unnecessary diplomatic tensions. However, the most important consequence of the Court of Justice's view, that under certain conditions a non-strictly judicial authority can issue an EAW, is the weakening of the procedural position of the individual at the stage of issuing the EAW (including the national base decision) and at the stage of executing the EAW, when the individual as the subject of the warrant cannot do much more than wait for the results of the examination of the systemic position of a non-strictly judicial issuing authority.

In order to release the national courts from executing EAWs through uncertain proceedings, the concept of an "issuing judicial authority" should be redefined in EU law and fitted to the EAW mechanism. The solution would be to introduce a competence reservation for issuance of an EAW, limited to strictly judicial authorities, such as a court or judge, while restricting the use of this redefined concept to the EAW procedure (without extending to other EU instruments of cooperation in criminal matters). The expected further result should be a change in those national legal orders in which non-

⁴⁷ Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice)* [GC], paras 33-79. On the assessment expressed in this judgment see P. BÁRD, W. VAN BALLEGOIJ, *Judicial independence as a Precondition for Mutual Trust? The CJEU in Minister for Justice and Equality v. LM*, in *New Journal of European Criminal Law*, 2018, p. 353 et seq.; D. KOCHENOV, P. BÁRD, *The Last Soldier Standing? Courts Versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, in E.H. BALLIN, G. VAN DER SCHYFF, M. STREMLER (eds), *European Yearbook of Constitutional Law 2019. Judicial Power: Safeguards and Limits in a Democratic Society*, The Hague: Springer, 2019, p. 274; M.A. SIMONELLI, "...And Justice for All?" *The Right to an Independent Tribunal after the Ruling of the Court of Justice in LM*, in *New Journal of European Criminal Law*, 2019, p. 329 et seq.

strictly judicial authorities have been authorised to issue an EAW (regardless of its purpose, whether for prosecution or enforcement of a sentence).

According to the analysis prepared by Eurojust after the Court of Justice’s judgments of 27 May 2019, the legislations of the following Member States involve the prosecutor’s office in issuing the EAW (in various ways and at various stages of the initial procedure): Denmark,⁴⁸ Austria, Luxembourg, Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Portugal, Sweden, Germany.⁴⁹ This analysis also contains references to differentiation between the attribute of independence of the prosecution service in the Member States. Firstly, in light of the Court’s position in *PF (Prosecutor General of Lithuania)* and in the joined cases *OG and PI*, the procedure for issuing EAWs adopted in Germany, Denmark and the Netherlands proved to be the most problematic due to the absence of the required independence of the prosecutor’s office from the executive. As a consequence of the Court’s rulings, the state authority empowered to issue an EAW in these national legal orders needed to be changed.⁵⁰ Secondly, it should be recognised that the regulations adopted in Luxembourg, authorising the Prosecutor General to issue an EAW for the purpose of executing a custodial sentence, are also problematic. The Prosecutor General in Luxembourg is subordinate to the Minister of Justice with regard to instituting criminal proceedings, so the systemic position does not guarantee independence.⁵¹ Thirdly, there is room for doubt about whether the national regulations providing for judicial authorisation of the non-independent prosecutor’s decision on an EAW should be altered in the direction of entrusting the entire competence to issue a warrant to strictly judicial authorities. One example of such a legal solution is the Austrian procedure for issuing an EAW, which provides for the judicial authorisation of the non-independent prosecutor’s decision on an

⁴⁸ It should be noted that the Danish and German regulations have already been changed.

⁴⁹ The analysis related to the legislative changes planned in Germany and already introduced in the Netherlands. Eurojust, Questionnaire on the impact of the CJEU Judgments in Joined Cases OG (C-508/18) and PI (C-82/19 PPU) and Case PF (C-509/18), 2019/00094, 26 November 2019, p. 10, www.eurojust.europa.eu. See also: Council, Decisions of the Court of Justice of 27 May 2019 in Joined Cases C-508/18 and C-82/19 PPU, Amendment of Germany’s notification under Article 6(3) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of 4 December 2019, 14444/19, data.consilium.europa.eu.

⁵⁰ The legal changes regarding the authority empowered to issue an EAW have already been implemented by Germany, the Netherlands and Denmark. See Council, Decisions of the Court of Justice of 27 May 2019 in Joined Cases C-508/18 and C-82/19 PPU, cit.; Council, Modification by the Netherlands of its statement under Art. 6, para. 3, of Framework Decision 2002/584/JHA on the European Arrest Warrant of 10 December 2019, 14979/19, data.consilium.europa.eu; Council, Implementation of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States – Notification by Denmark of 21 April 2020, 7430/20, ejn-crimjust.europa.eu.

⁵¹ See Luxembourg legislation: Law of 17 March 2004 on the European Arrest Warrant and surrender procedures between Member States of the European Union, as amended (Art. 26, para. 2) and the Code of Criminal Procedure, as amended (Art. 19).

EAW.⁵² Finally, despite the position taken by the Court of Justice, some domestic legal solutions are also controversial, specifically those in which the right to issue an EAW has been assigned to formally independent prosecutor's offices, as the evaluation of their independence will usually be problematic for an "executing judicial authority", given the overly complicated set of elements that should be examined. This reflection concerns to some extent the legal solutions adopted in Belgium, Bulgaria, Croatia, Estonia, Finland, France, Greece, Italy, Latvia, Lithuania, Portugal and Sweden.⁵³ One should not lose sight of the fact that the institutions involved in a prosecution participate to some extent in the implementation of internal criminal policy whose impetus for development is, however, provided by the executive power. This aspect is important not only at the stage of criminal prosecution, but also at the stage of enforcement of a court judgment.

The question arises as to how long this type of analysis will be valid. Given the dynamics of internal processes in Member States, it cannot be excluded that such analysis will be valid only on the date of issue. In addition, it is unclear whether this analysis will be updated and by what entity. This weakness means that national courts acting as "executing judicial authorities" cannot fully rely on this type of external analysis, and they do not have the appropriate tools to investigate the non-legal aspects of the status of a public prosecutor's office in the system of a foreign Member State. Their examination may be based only on insufficient data derived from the analysis of law, case files and information provided by the authorities of the Member State in which the EAW was issued. The national court is not able, due to the way it acts, to make a categorical assessment of the systemic position of a state body of a foreign state. This assessment is burdened with too great a risk of error. Involving the national court in making such an assessment results in the indirect politicization of the EAW mechanism. Ultimately, this legal uncertainty negatively affects the position of the individual in the EAW procedure.⁵⁴

From the perspective of the importance of the proper choice of decision-makers in the initial stage of the EAW procedure for effective judicial protection of the individual,

⁵² See Austrian legislation: Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG), as amended, Section 29, para. 1.

⁵³ See Council, Implementation of Council Framework Decision 2002/584/JHA, cit., p. 3 *et seq.*; Euro-just, Questionnaire on the impact of the CJEU Judgments in Joined Cases OG (C-508/18) and PI (C-82/19 PPU) and Case PF (C-509/18), cit., p. 6 *et seq.*

⁵⁴ Cf. the relevant remarks on the aspect of freedom and crime control in criminal justice policies: A. SANDERS, *A Fair Trial for the Suspect?*, in A. ESER, C. RABENSTEIN (eds), *Strafjustiz im Spannungsfeld von Effizienz und Fairness / Criminal Justice between Crime Control and Due Process: Konvergente und divergente Entwicklungen im Strafprozessrecht / Convergence and Divergence in Criminal Procedure Systems*, Berlin: Duncker & Humblot, 2004, p. 194 *et seq.*; G. DI CHIARA, *The Protection of the Right of Freedom on the European Union Level: The European Arrest Warrant and Non-custodial Pre Trial Measures. The Guideline of the Principle of Proportionality: An Interpretive Perspective*, in S. RUGGERI (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings. A Study in Memory of Vittorio Grevi and Giovanni Tranchina*, Berlin, New York: Springer, 2013, p. 242 *et seq.*

aligning national criminal procedures with a desirable clear EU definition of an "issuing judicial authority" would strengthen the protection of the individual. There are two solutions to the situation. The first is the introduction into EU law of a reservation of competence to issue the EAW to strictly judicial authorities. The second solution is the introduction of changes in domestic legislation, without reference to EU law, to reserve the power to issue an EAW for strictly judicial authorities, regardless of the level of independence of the prosecution service within the internal legal order, and regardless of the purpose of the EAW. This would ensure that a foreign court does not extend the execution of the EAW in order to examine the status of a non-strictly judicial issuing authority. This remark is based on the assumption that only a judicial authority in the narrow sense should be competent to issue an EAW, since any subsequent examination of the attribute of independence of a judicial authority in the broader sense is predisposed to too much risk of error, and undermines the procedural situation of the individual. Both solutions would release national courts from dealing with defective assessments and avoid prolonging the EAW procedure. The second solution, based on Member States' own initiatives in changing their national regulations, seems simpler. Nevertheless, the concept of an "judicial authority" entitled to issue an EAW should be considered in terms of the desirable minimum standard of EU law, and thus this issue should be excluded from the scope of procedural autonomy of the Member States.

V. FINAL REMARKS

If the EAW mechanism was designed to depoliticize previous extradition procedures, the current state of affairs, transferring to national courts the obligation to assess the independence of the "issuing judicial authority", constitutes, to some extent, a return to the politicisation of this mechanism. This is the result of both a not entirely thought out EU legislative policy concerning the concept of judicial authority in the EAW mechanism, and also of the Court of Justice's case law, which gives too much priority to the principle of mutual recognition at the expense of effective judicial protection of the individual at the stage of issuing the EAW.

The obligation to examine the independence of the "issuing judicial authority" by the "executing judicial authority" includes in advance a certain impossibility of complying with it. This impossibility is the result of too many factors that need to be assessed in order to make categorical statements about the independence of the foreign authority entitled to issue the EAW, in particular regarding system dependencies, institutional frameworks, and the current political situation, affecting how laws are enacted and applied. Neither EU law nor Court of Justice case law clearly indicates in which areas of the Member State's functioning, and with what tools, the "executing judicial authority" should carry out the examination of independence of the "issuing judicial authority". In the light of these circumstances, there is space for action at the level of EU law. Defining a coherent and clear concept of an "issuing judicial authority" within the meaning of Art.

6, para. 1, of Framework Decision 2002/584, and also limited to this area, without hasty extensions to other EU instruments of cross-border cooperation in criminal proceedings, should be seen as a desirable added value of EU law.

The current state of affairs and the seriousness of the EAW mechanism justify keeping the concept of an “issuing judicial authority” independent from national laws. Only then could one speak of a truly autonomous EU concept in this regard.