OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 30 April 2019(1)

Joined Cases C-508/18 and C-82/19 PPU

Minister for Justice and Equality

v

O.G.

and

P.I.

(Requests for a preliminary ruling from the Supreme Court (Ireland) and the High Court (Ireland))

(Reference for a preliminary ruling — Police and judicial cooperation in criminal matters — Framework Decision 2002/584/JHA — Article 6(1) — European arrest warrant — Concept of 'judicial authority' — Public Prosecutor's Office — Independence from the executive)

1. In my Opinion in *Özçelik* (2) I stated that 'although it would be tempting to try to give at this point a general reply to the doubt concerning the capacity of the Public Prosecutor's Offices of the Member States to issue [European arrest warrants], I do not think that this request for a preliminary ruling is the appropriate occasion', since the issue in that case was whether the Public Prosecutor's Office could issue a national arrest warrant (NAW) on the basis of Article 8(2)(c) of Framework Decision 2002/584/JHA. (3)

2. The appropriate occasion has now arisen, in the context of two references for a preliminary ruling in which two Irish courts need to know whether the German Public Prosecutor's Office may be regarded as a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision and, as such, is entitled to issue a European arrest warrant (EAW).

I. Legislative framework

A. EU law: Framework Decision 2002/584

3. The 5th, 6th and 10th recitals of the Framework Decision read:

'(5) The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. ...

(6) 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.

...

(10) The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof.'

4. Under Article 1 ('Definition of the European arrest warrant and obligation to execute it'):

'1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.

3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.'

5. Article 6 ('Determination of the competent judicial authorities'), provides:

'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.

2. The executing judicial authority shall be the judicial authority of the executing Member State which is competent to execute the European arrest warrant by virtue of the law of that State.

3. Each Member State shall inform the General Secretariat of the Council of the competent judicial authority under its law.'

B. National law: the Gerichtsverfassungsgesetz (4)

6. Paragraph 146 of the GVG states:

'The officials of the public prosecution office must comply with the official instructions of their superiors.'

7. Paragraph 147 stipulates:

'The 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.

...'

8. Paragraph 150 provides that:

'The public prosecution office shall be independent of the courts in the performance of its official tasks.'

9. Paragraph 151 is worded as follows:

'The public prosecutors may not perform judicial functions. They also may not be assigned responsibility for supervising the service of judges.'

II. Background to the disputes in the main proceedings and the questions referred for a preliminary ruling

A. Case C-508/18

10. On 13 May 2016, the Public Prosecutor's Office at the Landgericht Lübeck (Regional Court, Lübeck, Germany) issued an EAW for O.G., a Lithuanian citizen residing in Ireland, for a criminal offence of 'murder, grievous bodily injury', allegedly committed in 1995.

11. O.G. objected to his surrender in the High Court (Ireland), arguing, inter alia, that the Lübeck Public Prosecutor's Office is not a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision.

12. The High Court, in its judgment of 20 March 2017, rejected the objection raised by O.G. on the grounds that German law provides for the independence of public prosecutors and that it is only in exceptional circumstances that the executive can interfere with a decision of a public prosecutor, which had not occurred in this case.

13. The judgment was upheld on appeal by the Court of Appeal (Ireland), which applied the tests of 'functional independence' and 'operating de facto independently', in line with the approach adopted by the Supreme Court of the United Kingdom in *Assange* v. *Swedish Prosecution Authority*. (5)

14. An appeal was brought before the Supreme Court (Ireland), which referred the following questions to the Court of Justice under Article 267 TFEU:

'(1) Is the independence from the executive of a public prosecutor to be decided in accordance with his position under the relevant national legal system? If not what are the criteria according to which independence from the executive is to be decided?

(2) Is a public prosecutor who, in accordance with national law, is subject to a possible direction or instruction either directly or indirectly from a Ministry of Justice, sufficiently independent of the executive to be considered a judicial authority within the meaning of Article 6(1) of the Framework Decision?

(3) If so, must the public prosecutor also be functionally independent of the executive and what are the criteria according to which functional independence is to be decided?

(4) If independent of the executive, is a public prosecutor who is confined to initiating and conducting investigations and assuring that such investigations are conducted objectively and lawfully, the issuing of indictments, executing judicial decisions and conducting the prosecution of criminal offences, and does not issue national warrants and may not perform judicial functions a "judicial authority" for the purposes of Article 6(1) of the Framework Decision?

(5) Is the Public Prosecutor in Lübeck a judicial authority within the meaning of Article 6(1) of the Framework Decision ...?'

B. Case C-82/19 PPU

15. On 15 March 2018, the Public Prosecutor's Office of Zwickau (Germany) issued an EAW for P.I. for the purposes of conducting a criminal prosecution in respect of 7 robbery offences, carrying a potential maximum penalty of 10 years.

16. On 12 September 2018, the High Court endorsed the EAW for execution and, as a result, P.I. was arrested on 15 October 2018 and has remained in custody since that date.

17. P.I. objects to his surrender on the ground that the Zwickau Public Prosecutor's Office is not a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision.

18. In that context, the High Court has referred five questions to the Court of Justice which are identical to those referred by the Supreme Court in Case C-508/18, with the sole difference that question 5 refers to the Public Prosecutor in Zwickau.

III. Procedure before the Court of Justice

19. The references for a preliminary ruling were registered at the Court on 6 August 2018 and 5 February 2019 respectively. They have been dealt with as a matter of priority (C-508/18) or under the urgent procedure (C-82/19 PPU).

20. Written observations were submitted by O.G., P.I., the Minister for Justice and Equality (Ireland), the German, French, Lithuanian, Hungarian, Netherlands, Austrian and Polish Governments and the European Commission. The public hearing, held on 26 March 2019 together with that of Case C-509/18, *Minister for Justice and Equality* v *P.F.*, was attended by the Danish and Italian Governments, in addition to the parties which submitted written observations, with the exception of the Hungarian and Polish Governments.

IV. Analysis

A. Preliminary considerations

21. The first four questions, raised in identical terms by the Supreme Court and the High Court, are summarised in the fifth question raised in the two proceedings, that is to say: whether the Public Prosecutors of Lübeck and of Zwickau may be regarded as 'a judicial authority within the meaning of Article 6(1) of the Framework Decision'.

22. According to the two referring courts, the key criterion in order to answer that question is the independence of the Public Prosecutor's Office from the executive. They therefore wish to know which factors could have an impact on the assessment of that independence, citing the following:

– its position under national law (first question);

– whether it is subject to any instructions from the Ministry of Justice (second question); and

– the degree of 'functional independence' from the Ministry of Justice (third question).

23. In the event that it is independent of the executive, the referring courts also need to know whether the German Public Prosecutor's Office, as the body which conducts investigations, prosecutes criminal offences and executes judicial decisions, but which does not issue national arrest warrants or perform judicial functions, is a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision (fourth question).

24. Independence is indeed *the* institutional feature characteristic of judicial authority in a State governed by the rule of law. (6) It is a quality conferred on (and required by) courts so that they may adequately perform the specific function conferred on them, exclusively, by the State, in accordance with the principle of the separation of powers. It is an instrumental quality, secondary to the function which it serves, but essential to the existence of a genuine rule of law.

25. In order to determine whether the Public Prosecutor's Office may be regarded as a judicial authority within the meaning of Article 6(1) of the Framework Decision, it is necessary to examine, in the first place, whether it performs a function which is comparable, in substance, to that attributed to the judiciary. If so, it will then be examined whether it is in a position to perform that function independently. (7)

26. The case-law of the Court on this point contains some ambiguities (sometimes of a purely terminological nature), which have led, at least in part, to the doubts of the two referring courts. I believe that these doubts may be dispelled if, as I suggest, regard is had, in particular, to the characteristic features of the judicial function.

27. The Court has held that the concept of 'judicial authority', within the meaning of Article 6(1) of the Framework Decision, 'requires, throughout the Union, an autonomous and uniform interpretation', (8) and that its 'meaning and scope ... cannot be left to the assessment of each Member State'. (9)

28. In order to outline that autonomous concept, the Court has stated that 'the words "judicial authority", contained in that provision, are not limited to designating only the judges or courts of a Member State, but may extend, more broadly, to the authorities required to participate in administering justice in the legal system concerned'. (10)

29. However, the possible *extension* of that concept cannot reach the point that it covers the police services (11) or an organ of the executive. (12)

30. While setting out the reasons why the police or an organ of the executive cannot be regarded as a 'judicial authority', the Court highlighted two features which an institution must possess in order to be regarded as a 'judicial authority': (13)

- First, they must be authorities that 'participate in administering justice', which, in accordance with the principle of the separation of powers, excludes the aforementioned government or police authorities. (14)

- Secondly, they must be in a position to ensure that 'decisions relating to [EAWs] are attended by all the guarantees appropriate for decisions of such a kind, inter alia those resulting from the fundamental rights', and thus that 'the entire surrender procedure between Member States ... is carried out under judicial supervision'. (15)

31. The latter is decisive in order to 'provide the executing judicial authority with an assurance that the issue of [the EAW] has undergone ... judicial approval'. (16) This safeguards

the premiss on which the principle of mutual recognition, enshrined in Article 1(2) of the Framework Decision, is based. (17)

32. In my view, the first of these requirements, namely that of *participating* in administering justice, is sufficient to rule out the classification of institutions which are manifestly attached to the executive (again, the police or a department within the government itself) as a judicial authority. However, apart from its use in defining the outer limits of the concept (thus defining it in negative terms), the very possibility of its use in order to develop a positive definition (defining the content of the concept) depends on the fulfilment of the second requirement: that of ensuring that the fundamental rights involved in the process of issuing and executing an EAW are adequately safeguarded.

B. Participation in the administration of justice

33. In its proper sense, 'administering justice' is equivalent to 'exercising jurisdiction', that is to say, to adjudicating (*ius dicere*), which, in a State governed by the rule of law, is the exclusive domain of the judges and courts that make up the judicial branch of the State. (18)

34. In the field of criminal law, the exercise of jurisdiction by judges and courts may nevertheless depend on the involvement of other parties and institutions. Thus, for example, a private individual who brings an action or a police authority which conducts an investigation (or, a fortiori, which executes a summons or any other type of court order) does not *participate* in the administration of justice, but *collaborates* in its execution.

35. The role of the Public Prosecutor's Office is qualitatively different from that of those parties, since it exercises the powers of a public authority and, to that extent, is empowered by law to impinge, subject to certain limits, on the legal situation of citizens, either by affecting their rights and freedoms or, conversely, by contributing to the enjoyment of those rights and freedoms.

36. As I noted in my Opinion in *Özçelik*, (19) a distinctive feature of the Public Prosecutor's Office is 'its capacity — if this is provided for in the constitutional or legal rules of each Member State — to *participate* in the administration of justice, as an instrument of the State which institutes criminal proceedings and, within which, it may even adopt, at least provisionally, and for limited periods of time, custody and arrest warrants or similar decisions, before the arrested persons are passed to the court which has to decide whether they are to be released or imprisoned'.

37. The modalities of that participation of the Public Prosecutor's Office in the administration of justice are varied, and mechanisms or solutions intended for one area should not be automatically extrapolated to other areas of a different nature.

38. Thus, for example, Article 2 of Directive 2014/41/EU (20) mentions public prosecutors among the authorities that may issue a European Investigation Order. (21) Directive (EU) 2016/800 (22) refers, in recital 47 thereof, to a prosecutor as a 'judicial authority', but only for

the purposes of requesting the actual court to carry out a periodic review of the detention of children. (23)

39. Those references have to be analysed with care. As I stated in my Opinion in *Özçelik*, (24) 'it is not possible simply to equate the action of the Public Prosecutor's Office in one area (that relating to freedom, which is affected by the arrest of the persons concerned) and in another (the collection of evidence). What I mean is that its acceptance as a judicial authority in Directive 2014/41/EU, for investigation orders, does not necessarily indicate that it has to be extended also to the Framework Decision, for EAWs'.

40. It is, as I explained in that context, a 'legislative point, however, [which] constitutes serious support for the argument in favour of a broad interpretation, permitting consideration of the Public Prosecutor's Office as such, of the term "judicial authority" in the procedure for cooperation in criminal matters (including that of the EAW) to which Article 82 TFEU refers'. (25)

41. The Public Prosecutor's Office can therefore intervene in a qualified manner in criminal proceedings, either by bringing persons before a judge — under the conditions to which I refer immediately hereafter — or by providing the judge with evidence that could serve as a basis for a conviction. In the former case, it uses its prerogatives as a public authority to adopt, solely on a provisional basis and for a limited time, measures restricting liberty.

42. In all of its actions, it is subject to the principle of legality and must observe, (26) in particular, individual rights, which must be duly taken into consideration when it takes measures that restrict the exercise of those rights.

43. The relevant question here, specifically, is whether the *judicial* nature of the Public Prosecutor's Office, which is indisputable as regards the taking of evidence (or in other areas of criminal law cooperation), is also indisputable as regards issuing an EAW, that is to say, in the context of Article 6(1) of the Framework Decision.

44. The answer, in my view, has to be in the negative.

45. It is true that, in its judgment of 10 November 2016, *Özçelik*, (27) the Court ruled that an NAW issued by the Public Prosecutor's Office constitutes a 'judicial decision' within the meaning of Article 8(1)(c) of the Framework Decision, because it is a decision adopted by a 'judicial authority'. (28)

46. It is also true that that assertion was based on the need to ensure consistency between that provision and Article 6(1) of the Framework Decision itself. As regards the latter, the Court noted, citing the judgment in *Poltorak* that 'the term "judicial authority" must be interpreted as referring to the Member State authorities that administer criminal justice, but excludes police services'. (29)

47. However, in the judgment in *Poltorak*, the Court actually carried out a negative demarcation of the scope of the concept of 'judicial authority', (30) within the meaning of

Article 6(1) of the Framework Decision, in order to apply it to the interpretation of Article 8(1)(c) of the Framework Decision.

48. By contrast, I believe that in order to provide a positive demarcation of the scope of that concept, the judgment in *Özçelik* could not find support in the judgment in *Poltorak*. In that respect, the judgment in *Özçelik* reaches the conclusion, by itself, that, 'since the public prosecutor's office constitutes a Member State authority responsible for administering criminal justice ..., the decision of such an authority must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision'. (31)

49. However, in my view, apart from the exclusion of police services, (32) what applies to Article 8(1)(c) does not necessarily apply to Article 6(1) of the same Framework Decision. (33)

50. While I have no difficulty in accepting that the Public Prosecutor's Office, in so far as it participates in the administration of justice, may be regarded as an authority that issues a 'judicial decision' with the characteristics of an NAW, for the purpose of Article 8(1)(c) of the Framework Decision, I do not believe that that is necessarily the case for the purpose of Article 6(1) of that framework decision. On the contrary, it should not be the case.

51. In other words, while I consider, as I argued in my Opinion in *Özelik*, that the Public Prosecutor's Office may issue an NAW, I also consider that it cannot adopt an EAW. While that position may, at first sight, appear to diverge from the position I expressed in *Özelik*, (34) I shall try to explain why that is not the case.

C. The leading judicial role in the context of the Framework Decision

52. In *Özçelik*, it was necessary to determine whether a decision of the Hungarian Public Prosecutor's Office, ratifying an arrest warrant issued by the police, could be regarded as a 'judicial decision' within the meaning of Article 8(1)(c) of the Framework Decision.

53. The Court answered that question in the affirmative, on the grounds that, in the circumstances of the case, 'the confirmation of the [police] arrest warrant by the public prosecutor's office provides the executing judicial authority with an assurance that the [EAW] is based on a decision that had undergone judicial approval'. (35)

54. In my view, the 'judicial approval' that the Public Prosecutor's Office may carry out on an arrest warrant issued by the police is limited to determining whether the conditions laid down by the law for placing a person in custody without an express court order are met. It is generally the case in all Member States that the Public Prosecutor's Office may order the arrest or detention of a person only for a limited time, before the detained person must be released or brought before a court. (36) In other words, the Public Prosecutor's Office may not, in my view, ratify a police arrest warrant whose conditions and effects go beyond those of the arrests which it may itself order.

55. In its role as guardian of the law and, by extension, individual rights, the Public Prosecutor's Office is thus in a position to ensure that the person requested for the purposes of

conducting a criminal prosecution has 'already had the benefit, at the first stage of the proceedings, of procedural safeguards and fundamental rights, the protection of which it is the task of the judicial authority of the issuing Member State to ensure, in accordance with the applicable provisions of national law, for the purpose, inter alia, of adopting a national arrest warrant'. (37)

56. However, in addition to that first or initial guarantee, there is a second guarantee, which concerns the issue of the EAW. In the words of the judgment in *Bob-Dogi*, 'in addition to the judicial protection provided at the first level, at which a national judicial decision, such as [an NAW], is adopted, is the protection that must be afforded at the second level, at which [an EAW] is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision'. (38)

57. The protection to be granted at this second level — that of issuing the EAW — must, however, take into account a key factor which does not arise at the first level of the procedure: the possibility that the person concerned may be deprived of liberty for a much longer time, in the executing Member State. That is an important circumstance which in itself supports, in my view, the conclusion that the issue of EAWs should be reserved to judges and courts, excluding the Public Prosecutor's Office, as I argue below.

58. In accordance with the Framework Decision, the person who is the subject of an EAW may be held in custody in the executing Member State for a period of time which may, under certain circumstances, extend to 120 days. (39)

59. It is therefore a period which significantly exceeds those which arrests ordered by the Public Prosecutor's Office generally involve, which are always subject to an almost immediate decision by a judge or a court.

60. Again, in my view this is not a minor issue. The Minister for Justice and Equality has argued (40) that, without minimising the importance of the independence of any entity issuing an EAW, the requirements of independence should be less strict in that context than if it were a decision as to the guilt or innocence of the person concerned.

61. I do not share that view. In my view, the possibility that a person may be deprived of liberty for a period as long as that which the execution of an EAW may entail is sufficient to require of the entity responsible for the EAW such a high degree of independence that only courts *stricto sensu* can ensure it.

62. In the case of an NAW, the deprivation of liberty initially ordered by the Public Prosecutor's Office has to be checked and reviewed by a judge or court within a short period of time. They may also directly and promptly weigh up the facts and circumstances justifying the decision to deprive the person brought before them of his liberty.

63. By contrast, in the case of an EAW, the judicial authority in the executing Member State must deal primarily, as regards the individual situation of the requested person, with the objective of ensuring the surrender. It is true that the decision on provisional release must be

made in accordance with the national law of the executing Member State, (41) but, as regards the body of reasons supporting the NAW, the executing judicial authority has to rely on the judgement of the entity which, after taking on and assuming responsibility for the NAW, has chosen to issue an EAW. (42)

64. In order for the EAW to provide the executing judicial authority with the appropriate guarantees, the entity issuing the EAW must attest that the NAW on which it is based is entirely valid; in particular, that it has been issued with due respect for procedural safeguards and fundamental rights — a task which only judges and courts can carry out.

65. It is true that at the first level of protection — that of issuing the NAW — the Public Prosecutor's Office can provide guarantees in this regard, but only with a provisional scope and for as long as its decision is not upheld by a judge or court, the only authority capable of providing the effective judicial protection guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union.

66. Effective judicial protection is, in essence, the protection provided by a judge. That is to say, by that authority, which, by definitively applying the law to a particular case, ensures that the regulatory and decision-making procedure leading to the ultimate application of the provisions of the legal system (*ius dicere*) has been carried out in the manner laid down by the latter.

67. In 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, (43) and, moreover, are always subject to the final decision of the court. (44)

68. If the NAW is executed in the Member State itself, the actions of the Public Prosecutor's Office may be reviewed *ex post* by the judge or court before which the person in custody is brought, if he has not already been released. If the NAW cannot be executed, because the person sought is in another Member State, and an EAW is required, judicial scrutiny of the regularity of the NAW is carried out when determining whether an EAW should be issued. In both cases, the due process enshrined in Article 47 of the Charter is fully respected.

69. On the contrary, if the Public Prosecutor's Office could issue an EAW, the second level of protection of the procedure under the Framework Decision would be marked by the urgency and provisionality characteristic of the guarantees provided by the Public Prosecutor's Office.

70. In addition, it would make possible the adoption of a decision which, like the EAW, may involve a significant deprivation of liberty of the requested person in the executing Member State, by an entity which, in the issuing State, cannot order such an arrest except for very short periods and subject to prompt judicial scrutiny.

71. Furthermore, only the judge or court is capable of properly assessing the proportionality of issuing an EAW. (45)

72. It is true that, as discussed at the hearing, it is possible that the issuing of an EAW by the Public Prosecutor's Office might be challenged before a court in the issuing State itself. However, this would entail consequences which make it, in my view, undesirable.

73. In the first place, it would entail difficulties for the requested person in terms of exercising his rights of defence. First, because, as a result of his absence, it is most likely that he would only become aware that an EAW was issued when he is arrested in the executing Member State. Secondly, because he must exercise his right of defence without the guarantee of being present before the competent court.

74. In the second place, that possibility of review would entail a further delay in the surrender procedure, and thus adversely affect the freedom of the requested person, in the event that the EAW was issued and, for the purposes of its execution, a preventive detention order was made.

75. All those difficulties could be eliminated, in the most efficient manner, if, instead of granting the courts of the issuing State only the power to review an EAW issued by the Public Prosecutor's Office, they were conferred directly the power to issue EAWs, which corresponds to the purpose underlying the Framework Decision.

76. The referring courts start from the premiss that the German Public Prosecutor's Office cannot issue an NAW. (46) The German Government expressly confirmed this at the hearing, emphasising that it is a power exclusive to the courts. Thus, if, in Germany, the Public Prosecutor's Office is not able to issue an NAW or to perform judicial functions, I do not see how it could adopt a decision which may entail, in the executing Member State, a significant deprivation of liberty for the requested person, as is the case of the EAW. It would be paradoxical if it were not able to do the lesser act (issuing an NAW for a short period of time) but able to do the greater act (issuing an EAW which could lead to a much longer period of detention).

77. If, by contrast, and as is the case in other Member States, the German Public Prosecutor's Office were authorised to order the arrest of a person, even in exceptional circumstances and subject to certain limitations, to dispense with those limitations as regards the issue of an EAW would mean that the Public Prosecutor could do more in the executing Member State than it is allowed to do in the issuing Member State.

78. Lastly, and on another note, as I pointed out in the Opinion in *Özçelik*, (47) and as I note in the Opinion in Case C-509/18, (48) the legislative history of Article 6(1) of the Framework Decision seems to indicate that the legislature's intention was to exclude the Public Prosecutor's Office from classification as a judicial authority within the meaning of that provision. While I recognise the consistency of the arguments of those who take the opposite view (that the removal of the reference to the Public Prosecutor's Office, contained in the first version of the article, implies an extension of the concept of a 'judicial authority'), I think it is more reasonable to interpret it as a restriction of those terms.

D. The guarantee of independence

79. The German Government has argued that, for the Court, the decisive criterion is not the unlimited independence of the Public Prosecutor's Office, but rather its affiliation to the judicial branch. (49) In its view, the independence of the Public Prosecutor's Office is not to be confused with the independence of the courts since, unlike the activities of judges, the activities of the Public Prosecutor's Office do not require complete detachment from executive activity in the sense of prohibition of supervision or instruction. (50)

80. I do not share that view.

81. In the same way that, as I argued in the Opinion in *Poltorak* (C-452/16 PPU, EU:C:2016:782, point 34), 'there is a strong link between the nature of a judicial decision and the status of judicial authority from whom it comes', there is also a close link between the independence of an authority and the *status* of its decisions. In other words, the *judicial status* of an authority depends on the nature and the extent of its independence.

82. I believe that the level of independence required depends on the activity in question. The level of independence required of the authority issuing an NAW may not be as high as that required of a court, precisely because that NAW is in any event subject to final and prompt judicial scrutiny.

83. The issuing of an EAW triggers a procedure which, as I have reiterated, can result in a very serious interference with the freedom of the person concerned. The judicial scrutiny which must be carried out in the Member State of execution of the EAW cannot reach the level of promptness, completeness and intensity that can be attributed to the issuing judge in respect of the NAW that is at the origin of the EAW.

84. The independence of the entity issuing an EAW should therefore be as high as possible. Such a level of independence is possible only in a court *stricto sensu.* (51) It must be so because the executing judicial authority may only endorse an EAW that offers all the guarantees of a judicial decision. That is, a decision made by a court which, in doing so, enjoys the characteristic — and exclusive — independence of the judicial branch.

85. The Court was particularly unequivocal in holding, in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, that 'not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection — including the guarantee of independence'. (52)

86. The same judgment contains some clear statements about the independence of the authorities involved in issuing and receiving EAWs:

- 'The high level of trust between Member States on which the [EAW] mechanism is based is ... founded on the premiss that the criminal courts of the other Member States ... meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts.' (53)

– ‘In order for that protection to be ensured, maintaining the independence of those bodies is essential, as confirmed by the second paragraph of Article 47 of the Charter, which refers to access to an “independent” tribunal as one of the requirements linked to the fundamental right to an effective remedy (judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 41).’ (54)

87. That independence of the national authority which issues the EAW presupposes that the authority in question ‘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*, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.’ (55)

88. These statements, which are both categorical and relevant as regards situations in which judicial independence could be jeopardised, cannot be set side when it comes to judicial decisions affecting the freedom of persons. It would be paradoxical if, after the recent rulings of the Court in relation to judicial independence, *the level required were lowered*, and it were accepted that an authority which may be obliged to follow instructions from other bodies may be regarded as an independent judicial authority.

89. According to the Commission, (56) the requirement that the entity issuing an EAW must not be subject to directions or instructions does not arise from any need for it to be an authority endowed with judicial independence (which, in its view, is not part of the concept of ‘judicial authority’ in the Framework Decision), but rather from the legislative choices made in the Framework Decision to de-politicise the EAW procedure as compared to the classic extradition procedure.

90. The purpose of the Framework Decision is to replace the traditional system of extradition, characterised by a significant political element of expediency, with a system of surrender between judicial authorities, based on the principle of mutual recognition and founded on the high level of confidence between the Member States. (57)

91. The judicial authority/independence pairing can be separated only in those stages of the procedure for issuing an EAW where the guarantees provided by an authority which, although not a court, can be classified as a ‘judicial authority’ for the reasons set out in points 36 to 50 of this Opinion are sufficient. In that case, the impartiality and objectivity of the Public Prosecutor’s Office will be sufficient.

92. However, when it comes to adopting measures which may have a particularly serious impact on the freedom of persons, the procedure for their adoption must be judicial in the true sense and, consequently, can only be carried out by the judicial branch, that is to say, by an independent body *sensu stricto*.

93. In other words, ‘judicial authority’ is equivalent to ‘judicial branch’ (that is to say, independent body) where the exercise of public authority may give rise to such significant harm

to individual liberty, such as the one involved in the procedure for executing an EAW, the origin of which is necessarily the judicial authority that issued it. If that concept can be extended to cover other institutions, such as the Public Prosecutor's Office, that will be the case when the action is subject to relatively prompt judicial scrutiny, as is the case for NAWs (but not when an EAW is adopted).

94. The 'judicialisation' of the Framework Decision procedure, in contrast to the political nature of the classic extradition procedure, entails precisely the exclusive attribution of that procedure — in principle — to the judicial branch, which means attributing it, by definition, to a (fundamentally) independent body. (58) That is without prejudice to the possibility that, subject always to the appropriate judicial supervision, certain phases of the procedure may be entrusted to other institutions. That would be the case, for example, for the issue of the NAW which must precede any EAW.

95. The German Government openly admits that, while it may be exceptional in practice, the Public Prosecutor's Office may receive directions and instructions from the executive. (59) That alone is sufficient to rule out the possibility that the Public Prosecutor's Office enjoys judicial independence, which is conceptually incompatible with any type of directions or instructions whatsoever, however theoretical or exceptional they may be and whether or not there are formalised procedures for their transmission.

96. Independence, as mentioned above, is incompatible with any 'hierarchical constraint or subordinat[ion] to any other body'. Members of the judiciary are also independent from the higher courts, which — although they can review and annul the rulings of lower courts a posteriori — cannot, however, dictate to them how they should adjudicate.

97. By contrast, the hierarchical structure of the Public Prosecutor's Office in Germany reveals the existence of such subordination: under Paragraph 147 of the GVG, the Federal Ministry of Justice or its equivalents in the *Länder* supervise and direct the activity of the Public Prosecutor's Office, at their respective territorial levels. Furthermore, senior officials in the prosecution service of the higher or regional courts supervise and guide the officials at lower levels. (60)

98. It was stated at the hearing that there are very significant differences between the *Länder* as regards the institutional policy governing the Public Prosecutor's Office. In some *Länder* instructions to the Public Prosecutor's Office must be given in writing and be made public, whereas in others instructions may be given orally. Moreover, some *Länder* have proposed that that possibility is not used in any case.

99. In addition to this, there is further diversity between the Member States as regards the institutional and functional autonomy of the Public Prosecutor's Office. Although I expand upon this point in my Opinion in Case C-509/18, (61) the disparity between the systems would oblige the executing judicial authority to determine, in each case, depending on the Member State in which the EAW was issued, the degree of independence of the issuing Public Prosecutor's Office. In particular, it would be necessary to verify whether the Public Prosecutor's Office in question may receive instructions from the Ministry of Justice and whether that occurred in

relation to the specific EAW before it. The inevitable consequence would be a systematic delay in the procedure for the execution of the EAW (with the potential impact on the period for which the detained person is deprived of freedom) and the addition of a step which conflicts with the simplification that the legislature wished to apply to this mechanism of judicial cooperation.

V. Conclusion

100. In the light of the foregoing, I propose that the Court should reply to the Supreme Court (Ireland) and the High Court (Ireland) as follows:

> Article 6(1) of the 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, should be interpreted as meaning that the term 'issuing judicial authority' does not include the institution of the Public Prosecutor's Office.

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1 Original language: Spanish.

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2 C-453/16 PPU, EU:C:2016:783, point 45.

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3 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24) ('the Framework Decision').

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4 Law on the Judicial System ('the GVG').

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5 Judgment of 13 May 2012, [2012] UKSC 22.

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6 To cite one amongst many classic texts, Simon, D., *Die Unabhängigkeit des Richters*, WBG, Darmstadt, 1975.

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7 Being independent is not the same as merely acting objectively or in a non-arbitrary manner. Other branches of government, such as the administrative authorities, must also act in accordance with the principles of objectivity and impartiality, but it cannot be said that they are independent. Independence is the specific institutional guarantee that allows the judicial branch to act subject only to the law. Judicial independence cannot be equated with the status of other institutions that must reconcile their activities under the law with the political direction of the legitimate government, which is an integral part of the functioning of a democratic state.

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8 Judgment of 10 November 2016, *Poltorak*, (C-452/16 PPU, EU:C:2016:858, 'judgment in *Poltorak*', paragraph 32).

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9 Judgment in *Poltorak*, paragraph 31. The reasons for this are set out in paragraphs 24 to 30 of that judgment.

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10 Judgment in *Poltorak*, paragraph 33; and judgment of 10 November 2016, *Kovalkovas* (C-477/16 PPU, EU:C:2016:861, 'judgment in *Kovalkovas*', paragraph 34).

11 Judgment in *Poltorak*, paragraph 34.

12 Judgment in *Kovalkovas*, paragraph 35.

13 In doing so, the Court relied on the context of Article 6(1) of the Framework Decision and its objectives. Those are the two methods of interpretation which, together with literal interpretation, are usually taken into account when interpreting EU law. See, for all the above, judgment of 17 April 2018, *Egenberger* (C-414/16, EU:C:2018:257, paragraph 45).

14 Judgment in *Poltorak*, paragraph 35; and judgment in *Kovalkovas*, paragraph 36.

15 Judgment in *Kovalkovas*, paragraph 37.

16 Judgment in *Poltorak*, paragraph 45.

17 Judgment in *Kovalkovas*, paragraph 43.

18 This is underlined by the Commission in paragraph 28 of its written observations in Case C-508/18. The French Government, in paragraph 25 of its submissions in that case, and the Hungarian Government also highlight, precisely, the role of the Public Prosecutor's Office in the structure of the judicial system (paragraph 26 of the Hungarian Government's written observations).

19 C-453/16 PPU, EU:C:2016:783, point 52.

20 Directive of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (OJ 2014 L 130, p. 1). The Austrian and Polish Governments refer to this in their observations in Case C-508/18 (paragraphs 35 and 17, respectively).

21 Article 1 of Directive 2014/41 defines the European Investigation Order as 'a judicial decision which has been issued or validated by a judicial authority of a Member State ("the issuing State") to have one or several specific investigative measure(s) carried out in another Member State ("the executing State") to obtain evidence in accordance with this Directive'. According to Article 2(c)(i) of that directive, 'for the purposes of this Directive ... "issuing authority" means ... a judge, a court, an investigating judge or *a public prosecutor competent in the case concerned*'. Emphasis added.

22 Directive of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ 2016, L 132, p. 1).

23 That recital states that 'detention of children should be subject to periodic review by a court, which could also be a judge sitting alone. It should be possible to carry out such periodic review *ex officio* by the court, or at the request of the child, of the child's lawyer or of *a judicial authority which is not a court, in particular a prosecutor*'. Emphasis added.

24 C-453/16 PPU, EU:C:2016:783, point 51.

25 *Ibidem*, point 51.

26 For example, the written observations of the Hungarian Government (paragraph 26).

27 Case C-453/16 PPU (EU:C:2016:860) ('judgment in *Özçelik*').

28 The Court accepted that, as I pointed out in my Opinion in *Poltorak* (C-452/16 PPU, EU:C:2016:782, point 34), 'there is a strong link between the nature of a judicial decision and the status of judicial authority from whom it comes'.

29 Judgment in *Özçelik*, paragraph 32.

30 Judgment in *Poltorak*, paragraph 38.

31 Judgment in *Özçelik*, paragraph 34.

32 As well as 'an organ of the executive of a Member State, such as a ministry', as noted in the judgment in *Kovalkovas*, paragraph 35.

33 That is, however, the view of the German Government, which in paragraph 76 of its written observations in Case C-508/18 interprets the judgment in *Özçelik* as stating implicitly that the Public Prosecutor's Office is a judicial authority within the meaning of the (entire) Framework Decision. The Netherlands Government echoed this in paragraph 14 of its written observations in Case C-508/18. For a very critical view of that possibility, Rodríguez-Piñero y Bravo-Ferrer, M., 'Resolución judicial y autoridad judicial en la orden de detención europea', *Diario La Ley*, No 8876, 2016.

34 Some of the parties involved in these preliminary ruling proceedings have interpreted the Opinion in *Özçelik* in a manner which does not correspond to its actual substance.

35 Judgment in *Özçelik*, paragraph 36.

36 These conditions, to which I referred in my Opinion in *Özçelik* (C-453/16 PPU, EU:C:2016:783, point 56), are applicable in essence to all the Member States.

37 Judgment of 1 June 2016, *Bob-Dogi* (C-241/15, EU:C:2016:385, paragraph 55).

38 *Ibidem*, paragraph 56.

39 If the requested person does not consent to his surrender, he may continue to be deprived of liberty for up to 60 days after his arrest (Article 17(3) of the Framework Decision), which may be extended by a further 30 days (Article 17(4) of the Framework Decision). A 10-day period has to be added to that time for the surrender of the requested person after a final decision to execute the EAW has been made (Article 23(2) of the Framework Decision), which may be extended by up to 20 days (Article 23(3) and (4) of the Framework Decision).

40 Paragraph 30 of its written observations in Case C-508/18. Other parties defended the same position at the hearing.

41 Article 12 of the Framework Decision. According to the judgment of the Court of 12 February 2019, *TC* (C-492/18 PPU, EU:C:2019:108, paragraph 46), 'although Article 12 of [the] Framework Decision ... allows for the possibility, under certain conditions, of the person arrested on the basis of [an EAW] being provisionally released, neither that provision nor any other provision of that framework decision provides that, following the expiry of the time limits stipulated in Article 17 of the framework decision, the executing judicial authority is required to release that person provisionally or, a fortiori, to release him purely and simply', since otherwise 'the effectiveness of the surrender system put in place by that framework decision [could be limited] and, consequently, ... the attainment of the objectives pursued by it [could be obstructed]' (ibid., paragraph 47).

42 This is the *confidence* (recital 10 of the Framework Decision) which forms the basis of the principle of *mutual recognition*, the 'cornerstone' of judicial cooperation (recital 6 of the Framework Decision).

43 They are not independent in the sense that only the judicial branch can be. I expand upon this issue in the Opinion in Case C-509/18 which I also present today. See, also, in that respect point 73 et seq. of the present Opinion.

44 See, de Otto, I., *Estudios sobre el Poder Judicial*, Obras completas, Universidad de Oviedo and CEPC, Madrid, 2010, and Requejo Pagés, J.L., *Jurisdicción e independencia judicial*, CEPC, Madrid, 1989.

45 As in the Opinion in *Poltorak* (C-452/16 PPU, EU:C:2016:782, footnote 21), I refer, as regards proportionality in connection with the EAW, to the Opinion of Advocate General Bot in *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, EU:C:2016:140, point 137 et seq.), particularly with regard to the issuing judicial authority, points 145 to 155.

46 This is stated in paragraph 4.3 of the Supreme Court's order for reference, citing Paragraphs 150 and 151 of the GVG.

47 C-453/16 PPU (EU:C:2016:783, points 39 to 42).

48 *Minister for Justice and Equality* v *P.F.* (C-509/18).

49 Paragraph 95 of its written observations in Case C-508/18.

50 Ibid., paragraph 97.

51 The independence of the judicial branch is, like the courts themselves, in the service of the integrity of legal system, exclusively. The independence of other institutions must be reconciled with the pursuit of specific interests, such as the defence of the rule of law or the objectivity of administrative action. Such specific interests may only be pursued legitimately in accordance with the legal system, but do not have as their specific and exclusive purpose the defence of that system. While the legal system is the means by which those specific interests can be pursued, for the courts, the integrity of the legal system is the only relevant end, and therefore, its preservation requires a level of independence without exceptions or gradation.

52 C-216/18 PPU, EU:C:2018:586, paragraph 56.

53 Ibid., paragraph 58.

54 Ibid., paragraph 53.

55 Ibid., paragraph 63. My emphasis.

56 Paragraph 38 of the Commission's written observations in Case C-82/19 PPU.

57 In general, judgment of 16 July 2015, *Laningan* (C-237/15 PPU, EU:C:2015:474), paragraph 27.

58 I mentioned in point 73, footnote 53, of the Opinion in *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:547) that the German surrender system appeared to be based 'on the same procedure and the same principles as those which govern extradition'. As already pointed out in a report of 31 March 2009, submitted by the Council to the Member States after the fourth round of mutual evaluation on the practical application of the EAW, the German legislation in that area, including

after the 2006 reform, 'does not help practitioners to understand that surrender on the basis of an EAW is not merely a slightly different variety of the classical extradition but a new form of assistance based on completely different principles. In this situation, the experts consider that there is a risk that the [German] judicial authorities will fall back on extradition legislation and case-law ...' (ST 7058 2009 REV 2, of 31 April 2009, *Evaluation report on the fourth round of mutual evaluations 'The practical application of the European arrest warrant and corresponding surrender procedures between Member States', report on Germany*, p. 35).

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59 That theoretical possibility results not only from the institutional relationship between the Ministry of Justice and the Public Prosecutor's Office, but, more particularly, from the fact that, under German law, the Public Prosecutor's Office acts, in this area, on behalf of that Ministry (or its equivalents in the *Länder*). As I mentioned in point 73, footnote 52, of the Opinion in *Generalstaatsanwaltschaft (Conditions of detention in Hungary)* (C-220/18 PPU, EU:C:2018:547), 'according to the memorandum which the German Government sent to the General Secretariat of the Council on 7 August 2006 (ST 12509 2006 INIT, of 7 September 2006), "the competent judicial authorities for the purposes of Article 6 [of the Framework Decision] are the justice ministries of the Federal Republic and of the *Länder*"'. This is confirmed in paragraph 2.7 of the order for reference.

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60 At the hearing, there was some discussion concerning the possibility that a public prosecutor who did not comply with the instructions could even be removed from the case or be exposed, in the future, to negative consequences for his career. There is some controversy about this issue amongst the judiciary in Germany.

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61 *Minister for Justice and Equality* v *P.F.*, points 32 to 35.

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