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## NOTE

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From:	Presidency
To:	Delegations
Subject:	Conclusions of the AG in joined cases C-508/18 and C-82/19 PPU, regarding the question of whether a public prosecutor's office falls within the notion of 'judicial authority' - Exchange of views = Paper by the Presidency

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## Introduction

At the meeting of CATS on 13 May 2019, the Council Legal Service drew the attention of Member States to the Conclusions of Advocate General Campos Sánchez-Bordona of 30 April 2019 in joined cases C-508/18 and C-82/19 PPU. The Council Legal Service also referred to pending case C-154/19, concerning the same issue.

In his conclusions, attached to this note, the Advocate General (AG) proposed to rule that Article 6(1) of Council Framework Decision 2002/584/JHA on the European arrest warrant, should be interpreted as meaning that the term 'issuing judicial authority' does not include the institution of the Public Prosecutor's Office.

In short, the AG considers that public prosecutors are not sufficiently independent from the executive, since they may be obliged to follow instructions from the latter. Therefore, they would not qualify as a 'judicial authority', since, according to the AG, independence is *the* institutional feature characteristic of judicial authority in a State governed by the rule of law.

Although it 'only' concerns conclusions - the CJEU is expected to deliver its judgment on 27 May 2019 - the Presidency considers that it is useful to discuss this issue already at this stage, given the importance of the matter.

In fact, in many Member States EAW's are issued by public prosecutors. In some Member States, the law even provides that EAW's should be issued by public prosecutors. Hence, if the Court were to follow the AG, this could have substantial consequences, at least in some Member States.

The Presidency considers that it is advisable to raise awareness about this issue and to discuss what measures, if any, could or should be taken in case the Court were to follow, partially or entirely, the conclusions of the AG.

To be noted that the Presidency envisages three possible lines for the Court to take:

- a) the Court doesn't follow the AG, thus considering that public prosecutors may act as an issuing judicial authority (in this scenario, nothing changes);
- b) the Court follows the AG **partially**, considering that those public prosecutors that may be subject to instructions of the executive may *not* act as an issuing judicial authority;
- c) the Court follows the AG **entirely**, considering that public prosecutors in general may *not* act as an issuing judicial authority.

### Questions for discussion

The Presidency suggests debating this issue on the basis of the following two questions:

- 1) What would be the consequences for the practical operation of the EAW system in your Member State, if the CJEU were, partially or entirely, to follow the conclusions of the AG in joined cases C-508/18 and C-82/19 PPU?
- 2) Which measures/arrangements, if any, could or should be taken by Member States and/or the Commission in case the Court were to follow, partially or entirely, the conclusions of the AG (e.g., providing information among Member States, making notifications, etc)?

OPINION OF ADVOCATE GENERAL

CAMPOS SÁNCHEZ-BORDONA

delivered on 30 April 2019<sup>(1)</sup>

**Case C-509/18**

**Minister for Justice and Equality**

**v**

**PF**

(Request for a preliminary ruling from the Supreme 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. Today I also present my Opinion in Joined Cases C-508/18 and C-82/19 PPU, <sup>(2)</sup> concerning references for a preliminary ruling from the Supreme Court (Ireland) and the High Court (Ireland) respectively. In both cases the referring courts ask whether the German Public Prosecutor’s Office is a ‘judicial authority’ within the meaning of Article 6(1) of Framework Decision 2002/584/JHA. <sup>(3)</sup>
2. In that Opinion, I propose that the Court reply to the referring courts that the German Public Prosecutor’s Office is not an ‘issuing judicial authority’ within the meaning of Article 6(1) of the Framework Decision.
3. In this case, C-509/18, which also concerns a reference from the Supreme Court, the issue is the capacity of the Lithuanian Prosecutor General’s Office to issue a European arrest warrant (EAW). In line with the Opinion in Joined Cases C-508/18 and C-82/19 PPU, I will reiterate the same proposal as regards the Lithuanian Prosecutor General’s Office, notwithstanding its autonomy vis-à-vis the executive (unlike the German Public Prosecutor’s Office).

## **I. Legislative framework**

### **A. EU law**

4. I refer to the citation of the 5th, 6th and 10th recitals and Articles 1 and 6 of the Framework Decision, set out in the Opinion in Joined Cases C-508/18 and C-82/19 PPU.

### **B. National law**

5. Under Article 109 of the Constitution of Lithuania, justice is administered exclusively by the courts of law.

6. According to Article 118 of the Constitution of Lithuania, the function of the Public Prosecutor's Office is to organise and direct pre-trial investigations and prosecute criminal cases. In the performance of its functions, the Public Prosecutor's Office is independent from the representatives of each branch (legislative, executive or judicial) and from any political pressure or influence and is subject only to the law.

7. Pursuant to Article 3 of the Lietuvos Respublikos prokuratūros įstatymas (Law on the Public Prosecutor's Office of the Republic of Lithuania), (4) the Public Prosecutor's Office adopts its decisions in an independent and sovereign manner, in accordance with the law and the principle of reasonableness, while respecting the rights and freedoms of individuals, the presumption of innocence and the principle of equality before the law.

## **II. The facts which gave rise to the dispute in the main proceedings and the questions referred for a preliminary ruling**

8. On 18 April 2014, the Prosecutor General's Office of the Republic of Lithuania ('the Prosecutor General's Office') issued an EAW seeking the surrender of P.F. for the prosecution of an offence of armed robbery, allegedly committed in 2012.

9. P.F. objected to his surrender in the High Court, alleging, amongst other grounds, that the Prosecutor General's Office is not a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision.

10. By judgment of 27 February 2017, the High Court held that, in the light of the information provided by the Prosecutor General's Office, the latter participated in the administration of justice in the sense required by the Framework Decision. Consequently, it ordered the surrender of P.F.

11. The judgment of 27 February 2017 was upheld on appeal on 20 October 2017 by the Court of Appeal (Ireland).

12. An appeal was lodged before the Supreme Court, which has referred the following questions to the Court of Justice under Article 267 TFEU:

'(1) Are the criteria according to which to decide whether a public prosecutor designated as an issuing judicial authority for the purposes of Article 6(1) is a judicial authority within the autonomous meaning of that phrase in Article 6(1) of the Framework Decision ... that (1) the public prosecutor is independent from the executive and (2) considered in his own legal system to administer justice or participate in the administration of justice?

(2) If not, what are the criteria according to which a national court should determine whether a public prosecutor who is designated as an issuing judicial authority for the purposes of Article 6(1) of the Framework Decision is a judicial authority for the purposes of Article 6(1)?

(3) In so far as the criteria include a requirement that the public prosecutor administer justice or participate in the administration of justice is that to be determined in accordance with the status he holds in his own legal system or in accordance with certain objective criteria? If, objective criteria what are those criteria?

(4) Is the Public Prosecutor of the Republic of Lithuania a judicial authority in accordance with the autonomous meaning of this concept of Article 6(1) of the Framework Decision ...?'

### **III. Procedure before the Court of Justice**

13. The reference for a preliminary ruling was received at the Registry of the Court on 6 August 2018.

14. Written observations were submitted by P.F., 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 Joined Cases C-508/18 and C-82/19 PPU, 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**

15. The questions from the Supreme Court are summarised in the fourth question, that is to say: whether the Lithuanian Prosecutor General's Office is a 'judicial authority' within the meaning of Article 6(1) of the Framework Decision.

16. The referring court wishes to know, in particular:

- If, in order to resolve its doubts, it should take into account the independence of the Public Prosecutor's Office from the executive and whether its function is to 'administer justice or participate in the administration of justice' (first question).
- In the event that that function must be taken into account, whether the fulfilment of that requirement is to be determined in the light of the status of the Public Prosecutor's Office under national law or other objective factors (third question).
- If the first question is answered in the negative, what are the relevant criteria (second question).

17. In the Opinion in Joined Cases C-508/18 and C-82/19 PPU, I argue, as noted above, that the Public Prosecutor's Office cannot be regarded as an 'issuing judicial authority' within the meaning of Article 6(1) of the Framework Decision.

18. Without it being necessary to repeat them here, I refer to the reasons set out in that Opinion, which can be summarised by the idea that a deprivation of liberty such as that allowed under the Framework Decision procedure can only be adopted by a court *stricto sensu*, that is to say, 'the only authority capable of providing the effective judicial protection guaranteed by Article 47 of the Charter [of Fundamental Rights of the European Union]'. (5)

19. In the same Opinion, I also refer to the principle of judicial independence as a decisive criterion for the concept of 'judicial authority'. (6) That principle is central to the question referred in the present proceedings, and is therefore the focus of my analysis.

20. It is appropriate to note once again that, in the same way that there is a close correspondence between the nature of a judicial decision and the status of the authority which delivers it, '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'. (7)

21. Since the Public Prosecutor's Office does not exercise jurisdiction, it is, as a matter of principle, devoid of the independence inherent in the exercise of judicial functions.

22. It is true that national law may confer on the Public Prosecutor's Office the status of an independent body. However, in so far as its functions are not judicial, the independence granted to it cannot be 'judicial independence'.

23. According to the information in the case file, the Lithuanian Constitution provides (Article 118) that the Public Prosecutor's Office is independent from the representatives of the legislative, executive and judicial branches. However, that independence is conferred on it 'in the performance of its functions'. Those functions are to organise and direct pre-trial investigations and prosecute criminal cases. Clearly, those are not judicial functions, which strictly consist of applying the law in a definitive manner in order to resolve disputes. (8)

24. A judge exercising jurisdiction does not have any interest other than ensuring the integrity of the legal system. In order to safeguard that interest, he is granted independence which ensures that he is subject only to the law; that is to say, it ensures that he is not bound by any other particular interest, including other public interests such as facilitating the prosecution of crimes.

25. Authorities which, like the Public Prosecutor's Office, perform public functions within the legal system, rely on the judicial branch to ensure the integrity of that system. It is precisely because of that reliance that those authorities are able to devote themselves to pursuing the specific interests corresponding to their functions.

26. According to the information in the case file, the Lithuanian Public Prosecutor's Office is independent for the purpose of organising and directing criminal investigations and prosecuting offences, but not safeguarding the legal system as such. Its independence is at the service of the task conferred on it, which must be carried out *within the framework of the legal system*, using the means available to it under that system. Therefore, for the Public Prosecutor's Office, the legal system is a means to achieve an end.

27. By contrast, the judge is granted independence in order to exercise jurisdiction, that is to say, in order to state the law definitively in a specific case. His task is to deliver the *final decision* representing the application of the legal system, in such a way that the decision, which has the status of *res judicata*, is in accordance with the law and, to that extent, valid. From that perspective, it makes sense that the judge is granted independence, since the reason he is entrusted with the power to settle disputes (in accordance with the terms laid down by the regulatory and decision-making procedures which make up the legal system) is so as to guarantee to all the validity of that *final decision*, which must be given free of any interference.

28. It could therefore be said that the legal system is not a *means* for the judge, but rather an *end* in itself. More precisely, it is *the sole end* as a result of which, and for the attainment of which, he is granted a form of independence qualitatively different from that which may be attributed to the Public Prosecutor's Office or which may be inferred from the obligation of objectivity and impartiality characteristic of the administrative authorities.



29. Classifying the Public Prosecutor’s Office as an independent institution does not make it equivalent to the judiciary, in the same way that the so-called *independent authorities* which arise in the context of the regulation of various economic sectors are not equivalent to the judiciary. In particular, the independence of the Public Prosecutor’s Office is not comparable to that of the judge, as regards either its substance or its extent, since they perform different functions.

30. The autonomy of the concept of ‘judicial authority’ used in Article 6(1) of the Framework Decision (9) is a consequence of the need for a uniform definition of its meaning and scope throughout the European Union. It follows that Member States do not have the power to consider as an ‘issuing judicial authority’ institutions which, despite the fact that they do not exercise jurisdiction, are characterised as *independent* under national law. (10)

31. That last assertion is based, ultimately, on the premiss that the independence of the Public Prosecutor’s Office cannot be confused with judicial independence. It is also necessary to point out, in the context of the Framework Decision, the disadvantages that would arise from the recognition of institutions other than judges as issuing judicial authorities.

32. While it is recognised in all the Member States that the judiciary constitutes an independent authority — hence the confidence necessary for the mutual recognition of judicial decisions — the same cannot be said as regards the Public Prosecutor’s Office, as the references for a preliminary ruling in this case and in Cases C-508/18 and C-82/19 PPU demonstrate.

33. There is a noticeable variation in the level of autonomy of the Public Prosecutor’s Offices in the various Member States and, although, for conceptual reasons, that level could never reach that of judicial independence, the executing judicial authority would have to assess it in each case, in the light of the law applicable in the issuing Member State in respect of the Public Prosecutor’s Office.

34. That assessment could delay the surrender procedure, giving rise to requests for information or to challenges from the person concerned. Both would inevitably prolong the procedures and, accordingly, the measures involving deprivation of liberty which might have been adopted.

35. In the interests of the simplicity and expeditiousness of the procedure, and thus the right to liberty, it is therefore necessary to dispel a priori any uncertainty as regards the status of the authority that has issued an EAW and, consequently, to reserve the power to issue an EAW to an (independent) organ of the judicial branch.

36. Finally, I also note here that, in my Opinion in *Özçelik*, (11) I pointed out that 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.

37. Article 3 of the initial proposal for a Framework Decision (12) contained a definition of 'judicial authority' (issuer or recipient of the EAW) which expressly included the Public Prosecutor's Office. (13)

38. As I stated in the Opinion in *Özçelik*, (14) 'the explanatory memorandum of that proposal added that the term "judicial authority" corresponded to that of the European Extradition Convention of 1957 which, in turn, recognised as such the "judicial authorities as such and the prosecution services, but not the authorities of police force"'. (15)

39. The proposal was not adopted, and the reference to the Public Prosecutor was removed from the final version of Articles 1 and 6.

40. That removal has given rise to some uncertainty, with some arguing that it shows that it was taken for granted, without there being a need to expressly mention it, that the Public Prosecutor's Office forms part of the judicial authorities of the Member States, for the purposes of the EAW. (16)

41. Some of the Member States informed the General Secretariat of the Council, pursuant to Article 6(3) of the Framework Decision, that 'the competent judicial authorit[ies] under [their] law' to issue or execute an EAW were their respective Public Prosecutor's Offices. For those Member States, the removal of the express reference to the Public Prosecutor's Office would not have implied its exclusion.

42. However, those communications ‘neither prejudice nor constitute a precondition, in strictly legal terms, for the adjustment of the action of each Member State to the content of the Framework Decision. The provision authorises the Member States to designate or select, from among their judicial authorities, those which will be competent to receive or issue EAWs, but does not permit them to widen the concept of judicial authority by extending it to bodies which do not enjoy that *status*’. (17)

43. In my view, the removal of the reference to the Public Prosecutor’s Office must be interpreted as meaning that the legislature wished to exclude it from Article 6(1) of the Framework Decision. Since it was a much debated issue, if the legislature had wished to grant the Public Prosecutor’s Office the status of judicial authority, in the context of that provision, it would have expressly stated as such, as in the initial proposal.

44. According to the opposing view, the removal of the reference to the Public Prosecutor’s Office in the course of the legislative procedure, was justified in order to avoid redundancy. I do not believe, however, that this was the case, as demonstrated, precisely, by the uncertainty it has raised.

45. I favour the much simpler view that, if the initial proposal was intended to settle the debate on the judicial nature of the Public Prosecutor’s Office, by stating it explicitly, its subsequent removal not only does not reopen that debate, but, on the contrary, suggests that it should be resolved in the negative.

46. In the light of the above, and on the grounds of principle, certainty and simplification of the procedure which I have set out both in this Opinion and in the Opinion in Joined Cases C-508/18 and C-82/19 PPU, I believe that the interpretation which does not grant the Public Prosecutor’s Office the status of ‘issuing judicial authority’ within the meaning of Article 6(1) of the Framework Decision is the most consistent with the system established by the Framework Decision.

## V. Conclusion

47. In the light of the foregoing, I propose that the Court reply to the Supreme 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 *Minister for Justice and Equality*.

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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 Lietuvos Respublikos Teisės Aktų Registras (TAR), 0921010KONSRG 922324.

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5 The Court has emphasised in its judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 53), that, in order to ensure that protection, ‘maintaining the independence of [judicial] 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 Juizes Portugueses*, C-64/16, EU:C:2018:117, paragraph 41)’.

[6](#) Opinion in Joined Cases C-508/18 and C-82/19 PPU, points 24 and 79 to 99.

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[7](#) *Ibidem*, point 81.

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[8](#) I refer in that respect to points 66 and 67 of my Opinion in Joined Cases C-508/18 and C-82/19 PPU.

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[9](#) Approved by the judgment of 10 November 2016, *Poltorak* (C-452/16 PPU, EU:C:2016:858, paragraph 32).

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[10](#) I emphasise that this applies to Article 6(1) of the Framework Decision and not necessarily to Article 8(1)(c) thereof. In that respect, I refer to points 45 to 50 of my Opinion in Joined Cases C-508/18 and C-82/19 PPU.

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[11](#) Case C-453/16 PPU (EU:C:2016:783, points 39 to 42).

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[12](#) COM(2001) 522 final.

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[13](#) ‘For the purposes of this Framework Decision, the following definitions shall apply: (a) “*European arrest warrant*” means a request, issued by a judicial authority of a Member State, and addressed to any other Member State, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgment or a judicial decision, as provided for in Article 2; (b) “*issuing judicial authority*” means the judge or the public prosecutor of a Member State, who has issued a European arrest warrant; (c) “*executing judicial authority*” means 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 ...’

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[14](#) Case C-453/16 PPU (EU:C:2016:783, point 40).

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[15](#) The commentary to Article 3 of the proposal states: ‘The procedure of the European arrest warrant is based on the principle of mutual recognition of court judgments. State-to-State relations are therefore substantially replaced by court-to-court relations between judicial authorities. *The term “judicial authority” corresponds, as in the 1957 Convention (cf. Explanatory Report, Article 1), to the judicial authorities as such and the prosecution services, but not to the authorities of police force.*’ Emphasis added.

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[16](#) An excellent overview of the different positions in that debate can be found in the concurring and dissenting opinions expressed in the judgment of the Supreme Court of the United Kingdom of 30 May 2012 in *Assange v The Swedish Prosecution Authority*, [2012] UKSC 22.

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[17](#) Opinion in *Özçelik* (C-453/16 PPU, EU:C:2016:783, point 43).

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