Common Market Law Review **59**: 1–36, 2022.

EFFECTIVE JUDICIAL PROTECTION AND THE EUROPEAN ARREST WARRANT: NAVIGATING BETWEEN PROCEDURAL AUTONOMY AND MUTUAL TRUST

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Abstract

The article explores the ECJ case law on effective judicial protection in EAW proceedings, looking critically at the interpretation of Article 47 CFR in this context. The article reveals the approach to national procedural autonomy within the EAW case law, emerging most distinctly from the ECJ's interpretation of "judicial authority" under Framework Decision 2002/584/JHA. The case law analysis challenges the scholarly arguments according to which the Court's interpretation of Article 47 CFR has contributed to a significant erosion of national procedural autonomy. By contrast, the article concludes that in the context of judicial cooperation in criminal matters, the ECJ case law has mostly sought to mitigate the impact of Article 47 on national procedural autonomy. The Court may have done so to accommodate specific policy priorities pertaining to the nature of the EAW system (e.g. the fight against impunity) and uphold the principle of mutual trust. While showing internal incoherence in the interpretation of the notion of "judicial independence", the Court has thus far failed to provide convincing arguments to secure the right to an effective judicial remedy for requested individuals in the cases at hand.

1. Introduction

The principle of effective judicial protection, now enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the Charter), encompasses the right to an effective remedy and the right to a fair trial. The principle sets forth an obligation to provide remedies of a judicial nature to protect the rights guaranteed by EU law. In recent years, this "constitutional" provision has gradually disclosed part of its potential thanks to a rapidly growing body of case law, with the Court of Justice of the European Union taking a bolder

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stance *vis-à-vis* national procedural autonomy.[1] One of the most significant patterns within this body of case law has emerged from the interpretation of key provisions of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD-EAW).[2] This instrument, replacing traditional extradition procedures, sets up a major legal structure that allows for the surrender of accused and convicted individuals across the different EU Member States. The FD-EAW is also the first "third pillar" instrument to implement the principle of mutual recognition,[3] famously the "cornerstone"[4] of judicial cooperation in criminal matters.

The practice of EU surrender proceedings in the last two decades is often described as a success story,[5] though criticisms regarding a less-than-optimal protection of fundamental rights in that context have punctuated its recent history. One of the major sticking points concerns the possibility to refuse cooperation in the event of a *fumus* of fundamental rights violation upon surrender in the issuing State. The FD-EAW has notoriously failed to include among its grounds for refusal the traditional clause of *ordre public*, allowing an executing authority to refuse the surrender of a defendant or convicted individual if extradition proceedings might lead to an infringement of fundamental rights.[6] Importantly, the EU constitutional framework in which the EAW operates witnessed drastic transformations upon the entry into force of the Treaty of Lisbon, entailing *inter alia* the "codification" of the principle of mutual recognition (Art. 67(3), Art. 82(1) TFEU) and the attribution of binding legal force to the Charter.[7] Notably, the "constitutionalization" of the Charter has given further substance to the broad provision of Article 1(3) FD-EAW which, referring to Article 6 TEU, states that the Framework

1. Prechal, "Effective judicial protection: Some recent developments – moving to the essence", 13 REALaw (2020), 176.

2. O.J. 2002, L 190/1.

3. Opinion of A.G. Ruiz-Jarabo Colomer in Case C-303/05, *Advocaten voor de Wereld*, EU:C:2006:552, paras. 41 et seq. The Commission famously defined the EAW as the "first and the most symbolic measure applying the principle of mutual recognition"; see COM(2005)63 final, Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 23 Feb. 2005, Brussels.

4. See the Tampere European Council, Conclusions of the Presidency of 15 and 16 Oct. 1999 (No 33).

5. Perignon and Daucé, "The European arrest warrant: A growing success story", 8 *ERA Forum* (2007), 203–214.

6. Satzger, "Mutual recognition in times of crisis – Mutual recognition in crisis? An analysis of the new jurisprudence on the European arrest warrant", 8 *European Criminal Law Review* (2018), 317–331.

7. Mitsilegas, "The symbiotic relationship between mutual trust and fundamental rights in Europe's area of criminal justice", 9 NJECL (2015), 457.

Decision must not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles.

These transformations, in the post-Lisbon era, have prompted a growing number of preliminary rulings aimed at clarifying the status of fundamental rights in surrender proceedings. In some of its recent decisions, the ECJ has dealt with the interpretation of Article 47 and the right to effective judicial protection in relation to the EAW system. While restating the principle that surrender to the issuing State shall not be in breach of the fundamental right to an independent tribunal (and, therefore, of the essence of the fundamental right to a fair trial),[8] the Court has progressively developed an autonomous notion of "judicial authority" which incorporates some of the requirements of judicial independence as defined under Article 6 ECHR and the case law of the European Court of Human Rights (ECtHR). Far from being of relevance to the EAW alone, the findings of the ECJ's case law have wider implications and speak to the broader issue of fundamental rights protection in the context of cross-border cooperation. More specifically, the questions raised by national courts through the preliminary ruling procedure point to a wider problem regarding the requirements of effective judicial protection in transnational criminal proceedings,[9] one that affects EU legal instruments other than the FD-EAW (see e.g. Directive 2014/41 on the European Investigation Order).[10]

Against this background, the present contribution explores the Court's case law on effective judicial protection in EAW proceedings, trying to identify its most relevant findings. In particular, the article's *main argument* is to expose the approach to and implications for national procedural autonomy within the EAW case law, as they emerge from the interpretation of the notion of "judicial authority". In doing so, the article takes issue with the scholarly argument that the Court's interpretation of Article 47 CFR has contributed to an erosion of national procedural autonomy, far beyond the implications of traditional principles of EU law such as effectiveness and equivalence.[11]

8. See Case C-216/18 PPU, *LM*, EU:C:2018:586, para 48; Joined Cases C-354 & 412/20 PPU, *L&P*, EU:C:2020:1033, para 58. See also the recent Opinion by A.G. Rantos in Joined Cases C-562 & 563/21 PPU, *X & Y*, EU:C:2021:1019.

9. See for a broader discussion of this topic, Böse, Bröcker and Schneider, "Introduction" in Böse, Bröcker and Schneider (Eds.), *Judicial Protection in Transnational Criminal Proceedings* (Springer, 2021), p. 17.

10. See the recent judgment in *Gavanozov II* as regards the interpretation of Art. 14 of Directive 2014/41 on the European Investigation Order (EIO), Case C-852/19, *Gavanozov II*, EU:C:2021:902, where the ECJ concluded that such a Directive interpreted in light of Art. 47 CFR requires domestic law to provide for remedies against the issuing of an EIO. In addition, an EIO would be invalid in the absence of effective remedies.

11. In some post-Lisbon judgments, the Court has given the impression of considering primarily the principle of effective judicial protection of Art. 47, while leaving the so-called *Rewe* principles in the background; see Case C-279/09, *DEB*, EU:C:2010:811. For a comment

Particularly in some areas, the principle of effective judicial protection stemming from the Charter has been relied on by the Court to conduct a deeper scrutiny of national procedural rules than with the allegedly "milder" principle of effectiveness.[12] Some scholars went so far as to argue that effective judicial protection entirely overrides procedural autonomy as a result of the central role played by Article 47.[13] The present article tries to nuance this claim as, in the context of judicial cooperation in criminal matters, the ECJ case law has sought to mitigate the impact of Article 47 on national procedural autonomy. Mostly, the Court has done so to accommodate specific policy priorities that pertain to the nature of the EAW system and, by extension, the whole system of judicial cooperation in criminal matters based on mutual trust. It is submitted that those priorities have contributed to shape the ECJ's approach to effective judicial protection in this field and explain some remaining inconsistencies as regards the concept of judicial independence.

While exploring the interpretation of the term "judicial authority" under the FD-EAW, the article develops a *secondary,* flanking *argument* which pertains to the right to a judicial remedy. It is submitted that the Court has sought to enhance the procedural safeguards protecting the right to liberty of persons requested for surrender, by requiring that decisions issued by prosecutors must be subject to proceedings in court. This has been done to compensate the relatively moderate approach taken for the question of judicial independence (see section 6 below). However, the case law on the EAW remains blind to the specific features of the right to liberty, which is protected by special procedural guarantees under Article 6 CFR and Article 5(4) ECHR: the so-called *habeas corpus* safeguards. The discussion of this secondary argument is needed in order to fully grasp the ECJ's understanding of effective judicial protection. It is argued that in the Court's case law, the notion of "judicial authority" and the right to a remedy are effectively two sides of the same coin. Yet, the failure to engage explicitly with Article 6 and *habeas corpus* in this context may be seen as another indication of a deferential attitude towards national procedural autonomy.

Both the arguments summarized above are taken account of in the review of case law conducted in this article, as they provide a normative and analytical benchmark with which to scrutinize the Court's findings.

on this case, see Prechal and Widdershoven, "Redefining the relationship between '*Rewe*-effectiveness' and effective judicial protection", 4 REALaw (2011), 31–50, at 38.

12. Widdershoven, "National procedural autonomy and general EU law limits", 13 REALaw (2019), 176.

13. Bobek, "Why is there no principle of 'procedural autonomy' of the Member States?" in Michlitz and De Witte (Eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011), p. 313.

Section 2 discusses the role of effective judicial protection within the EAW system, and its interpretation in the early case law of the ECJ. Section 3 continues by introducing the doctrine of the "dual level of judicial protection" underpinning the EAW system and explaining the interrelationship between mutual trust and procedural autonomy. Sections 2 and 3 thus lay the groundwork for the remainder of the article by introducing the key concepts. Section 4 is devoted to analysing how the development of an autonomous notion of "judicial authority" under the FD-EAW entails negative obligations that curtail national procedural autonomy. Similarly, in section 5 the most recent developments in the ECJ's case law are discussed, as they build on previous case law to develop a duty for executing authorities to ascertain the "independence" of authorities enabled to issue an EAW under domestic law. While such developments, summarized in sections 4 and 5, seem to confirm the argument that emphasis on effective judicial protection reduces procedural autonomy (see above in this section), the picture is more complex. As a matter of fact, the ECJ accepts that prosecutors may qualify as "judicial authorities" for the purpose of the FD-EAW, while not being otherwise regarded as a "court or tribunal" under EU law. This choice has the effect of including prosecutors among the issuing authorities for the FD-EAW. The reasons underpinning such an interpretation are subject to critical analysis in section 6. The point is made that inconsistencies in interpreting the notion of "judicial authority" may be explained as an attempt to factor in some specific features of the EAW system and its overall policy objectives. To conclude, section 7 turns to the most recent case law, expanding on the notions of "judicial authority" and the specific procedural safeguards a requested person enjoys *vis-à-vis* their right to liberty. This section looks at the requirement that issuing decisions by a prosecutor should be subject to review in court. It claims that this requirement has been somewhat watered down by recent judgments, mostly owing to the ambiguity of the "dual level of protection" doctrine, as well as greater deference to national procedural autonomy.

2. Effective judicial protection, "judicial authorities" and the impact on national procedural autonomy: Hesitancy and deference in the ECJ's case law on the EAW

As is well known, the EAW system replaces the process of extradition and its mixed judicial/political decision-making, by putting the power to issue and execute a surrender request in the hands of the judiciary. The newly acquired centrality of judicial authorities restricts the discretion of government officials in both the requesting and the requested States, and is meant to shield criminal

justice cooperation from political interference. Thus, the executive is confined to performing administrative tasks as the Member States may appoint "central authorities" in charge of coordinating the activity of the relevant judicial bodies while being deprived of any decision-making power.[14] Though this choice may have the effect of raising the level of fundamental rights protection in surrender proceedings,[15] the most apparent justification for a change of paradigm seems to reflect a need to increase the effectiveness of such proceedings.[16] In the context of extradition, the scarcely transparent decision-making of the relevant ministerial bureaucracies (ministries of justice and/or the ministries of foreign affairs) is often to blame for a lack of swift and timely cooperation between law enforcement officials.[17] EU law responds to this issue by putting judicial actors at the forefront in such a way as to streamline and accelerate the surrender procedure,[18] while making the recognition of foreign judicial decisions quasi-automatic (that is, based on a limited number of grounds for refusal).

In accordance with the logic of mutual recognition, the EAW relies heavily on a horizontal inter-judicial dialogue[19] and therefore requires an EAW to be issued and executed by a "judicial authority" (see Art. 6(1) and (2) FD-EAW respectively).[20] Yet, the text of the FD-EAW does not provide an immediate answer to the question of what level of judicial protection is required within cross-border proceedings. Since the outset, one of the dilemmas posed by the implementation of the FD-EAW has been whether the notion of "judicial authority" could be interpreted according to the different national laws, thus leaving discretion to the Member States in the choice of the authorities tasked

14. See Opinion of A.G. Campos Sánchez-Bordona in Case C-220/18 PPU, *LM*, EU:C:2018:589, para 70.

15. Opinion of A.G. Campos Sánchez-Bordona in Case C-452/16 PPU, *Poltorak*, EU:C:2016:782, para 43.

16. COM(2001)522 final, Proposal for a Council framework decision on the European arrest warrant and the surrender procedures between the Member States, O.J. 2001, C 332E/305–319.

17. Plachta, "European arrest warrant: Revolution in extradition", 11 *European Journal of Crime Criminal Law and Criminal Justice* (2003), 178; Alegre and Leaf, "Mutual recognition in European judicial cooperation: A step too far too soon? Case study – the European arrest warrant", 10 ELJ (2004), 210.

18. Opinion of A.G. Campos Sánchez-Bordona in Joined Cases C-508/18 & 82/19 PPU, *OG & PI*, EU:C:2019:337, paras. 90, 92, 94.

19. See Proposal COM(2001)522 final, cited *supra* note 16, p. 7, which speaks in the article-by-article commentary of "court-to-court relations between judicial authorities".

20. Some authors believe that the judicial nature of the EAW is what conceptually distinguishes "surrender" from "extradition"; see Lagodny, "Extradition without a granting procedure: The concept of surrender" in Blekxtoon and van Ballegooij (Eds.), *Handbook on the European Arrest Warrant* (TMC Asser press, 2005), pp. 41–42.

with issuing or executing an EAW.[21] As a matter of fact, while some interpretive elements may be gauged from the legislative history of the instrument and the comparison with its predecessors (the Council of Europe's Convention on Extradition which loosely refers to the role of a "competent authority"), the conceptual contours and scope of the term "judicial authority" has always remained problematically blurry. Among them, the question of whether public prosecutors qualify as a "judicial authority" within the meaning of Article 6(1) and (2) FD-EAW has proved particularly controversial.

Remarkably, the early rulings of the ECJ on the FD-EAW fail to offer an adequate response to these questions. Instead, in this initial phase the ECJ seemed more eager to maximize the effectiveness of the surrender mechanism at the expense of judicial protection. An example of this approach is the judgment in *Jeremy F*.[22] Here, the ECJ was called on to decide on the compatibility with EU secondary law of national legislation providing for an appeal with suspensive effects against a judicial decision derogating from the speciality rule under Article 27(4) FD-EAW or allowing an onward transfer pursuant to Article 28(3). In the Court's view, while the FD-EAW does not prevent Member States from providing for such an appeal, it requires that decisions relating to EAWs "are attended by all the guarantees appropriate for decisions of such a kind".[23] In particular, the right to an effective remedy as set out in Article 47 CFR features prominently within the surrender procedure established by the FD-EAW. While such a provision does not require that Member States establish "a second level of jurisdiction" (that is, a right to appeal) against an executing decision, the standard of effective judicial protection is already met by several provisions in the FD-EAW (including those subject to a preliminary ruling).[24]

In *Jeremy F*, the ECJ famously states that the entire surrender mechanism provided for by the FD-EAW must be carried out under judicial supervision.[25] This argument draws on Article 47 CFR. Yet, the repercussions for procedural autonomy are limited and the ECJ seems cautious to impose stringent requirements on national authorities. There is no duty for Member States to adopt specific procedural arrangements to implement the right to effective judicial protection (e.g. by requiring the mandatory provision of a second level of jurisdiction). With complex argumentation that blends a traditional appeal

21. See in this regard Supreme Court of the United Kingdom, judgment of 30 May 2012, *Assange* v. *Swedish Prosecution authority*, (2012) UKSC 22.

22. Case C-168/13 PPU, *Jeremy F*, EU:C:2013:358.

23. Ibid., para 39.

24. These include judicial decisions pursuant to Arts. 27(4) and 28(3)(c) FD-EAW concerning the rule of speciality and onward transfers, respectively.

25. Case C-168/13 PPU, *Jeremy F*, para 46.

to procedural autonomy with a more policy-specific reference to the notion of "mutual trust" as a pre-condition for judicial cooperation, the ruling in *Jeremy F* sets forth that in the absence of further detail, Member States remain free to choose the judicial remedies available to the requested person.[26] This margin of appreciation derives, *inter alia*, from the principle of mutual recognition or, more specifically, from "mutual confidence" that legal systems would be "capable of providing equivalent and effective protection of the fundamental rights recognized at European Union level".[27] Here, the Court refers quite explicitly to the principles of effectiveness and equivalence (first developed in *Rewe*[28]) as a guide for national discretion in the choice of judicial remedies. In other words, EU secondary law does not offer specific indications as to how Member States must organize their procedural law in the implementation of the FD-EAW (nor their judicial system more broadly).

Overall, the judgment in *Jeremy F* shows a great deal of deference towards national procedural autonomy. On the one hand, the ECJ recalls that the FD-EAW was adopted on the basis of Article 34(2) TEU prior to the entry into force of the Treaty of Lisbon. Under this provision, Framework Decisions are understood as instruments leaving to national authorities the choice of the "form and methods" of their implementation, while being explicitly deprived of direct effect. On the other hand, the judicial argumentation reflects a concern for the effectiveness of the legal instrument at issue; the Court refuses to develop more stringent requirements of judicial protection, as these might delay the execution of an EAW and hinder the *effet utile* of the EU surrender system. To put it into context, such a view flows from a very restrictive understanding of "mutual recognition" underpinning the Court's case law on the EAW, at least until 2016.[29] Unsurprisingly, in *Jeremy F*, EU secondary law is interpreted in such a way as to allow the possibility of bringing an appeal against the decision to execute an EAW, but with the important *caveat* that a

26. After all, as the Court recalls, the original legal basis (Art. 34 TEU) in its version preceding the entry into force of the Treaty of Lisbon would leave to the national authorities the choice of form and methods needed to achieve the desired results of framework decisions; see ibid., para 52.

27. Ibid., para 50: so that it is therefore within the legal system of the issuing Member State that persons who are the subject of an EAW can avail themselves of any remedies which allow the lawfulness of the criminal proceedings for the enforcement of the custodial sentence or detention order, or indeed the substantive criminal proceedings which led to that sentence or order, to be contested.

28. Case C-33/76, *Rewe*, EU:C:1976:188.

29. Caeiro, "Scenes from a marriage: Trust, distrust and (re)assurances in the execution of the European arrest warrant" in Carrera, Curtin and Geddes (Eds.), *20 Year Anniversary of the Tampere Programme. Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (European University Institute, 2020) who speaks of an interpretation of mutual recognition geared towards "maximal execution". See within this group of cases, Case C-399/11, *Melloni*, EU:C:2013:107.

final decision on the execution of a warrant must in any event be taken within the time limits laid down in Article 17 of the FD-EAW.[30] Against this background, important dilemmas, such as what makes a national authority "judicial" under EU law, remained problematically unsolved.

3. Eroding procedural autonomy through mutual trust? The "dual level of judicial protection" in EAW proceedings

Later cases addressing the right to effective judicial protection in the EAW system reveal a more nuanced approach. It is noteworthy that this recent line of judgments originates from a clarification of the relationship between the EAW and the underlying national arrest warrant issued against a requested person. In *Bob-Dogi*,[31] the question raised by the national referring court revolved around the interpretation of Article 8(1) FD-EAW as regards the content and form of the EAW (as set out in the annex to the FD-EAW), particularly in connection with the information required under Article 8(1)(c) ("evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect").[32] The ECJ took the view that a national "simplified" procedure entailing the issue of an EAW in the absence of a prior domestic judicial decision (e.g. a national arrest warrant) sits uneasily with the principle of mutual recognition "on which the European arrest warrant system is based".[33] More to the point, the ECJ argued that mutual confidence between Member States within cross-border cooperation relies on the existence of a "dual level of protection", which enables an executing judicial authority to trust that the requested person was given the benefit, in the issuing State, of procedural safeguards and fundamental rights. The first level of protection concerns the judicial protection provided at the national level where a national arrest warrant is issued; the second level relates to the decision to issue the EAW.

The stance taken by the Court is key to understanding the most recent developments revolving around the EAW system and departs from the judgment in *Jeremy F*. While drawing on the notion of "mutual trust",[34] the ruling in *Bob-Dogi* comes to the different conclusion of emphasizing the need for increased judicial protection at the expense of effectiveness. For mutual

30. Case C-168/13 PPU, *Jeremy F*, para 75.
31. Case C-241/15, *Niculaie Aurel Bob-Dogi*, EU:C:2016:385.
32. See for an analysis of the judgment, van der Mei, "The European arrest warrant system: Recent developments in the case law of the Court of Justice", 24 MJ (2017), 882–904.
33. Case C-241/15, *Bob-Dogi*, para 66.
34. Prechal, "Mutual trust before the Court of Justice of the European Union", 2 *European Papers* (2017), 75–92.

recognition to function properly, an executing State must rely on the premiss that "a first level" of fundamental rights protection, at which a national judicial decision is adopted, may be granted under the law of the issuing State. It is incumbent on the judicial authority of the issuing Member State to ensure in practice that the requested person enjoys procedural safeguards and fundamental rights in accordance with national law. This first level of protection must be kept distinct from a second level of protection, embodied in the EU surrender mechanism based on inter-judicial dialogue. In the individual case, this recognition has implications for the execution of an EAW. Member States must ensure that a national arrest warrant is issued in a way that complies with the requirements of judicial protection. Hence, pursuant to the FD-EAW as interpreted by the ECJ in *Bob-Dogi*, an executing judicial authority is not obliged to enforce an EAW if the latter is not based on a distinct judicial decision meeting such requirements.[35]

More crucially, the ECJ's reasoning illuminates for the first time the role of judicial protection under national law as a pre-condition for inter-State cooperation in criminal matters. This must be taken as an acknowledgement that the inherently "judicial" nature of the EAW system (see section 2) is not self-sufficient. Rather, it relies heavily on procedures and institutions regulated by national law. The ruling in *Bob-Dogi* signals a more holistic approach to judicial protection, as it carries out a scrutiny of procedural and institutional arrangements at the domestic level. This speaks to the main argument made in this article regarding the implications of the Court's case law on procedural autonomy. At the same time, this change of tone shows increasing awareness of the sensitive content of decisions issued under the FD-EAW, which impact directly on a person's right to liberty. In particular, it seems to imply that for a requested person to have effective judicial protection, a national decision must be taken by a court in accordance with Article 5(4) ECHR. This finding, in turn, reflects the importance for a person to have a judicial review of decisions impinging on the right to liberty. For this to happen, the authority adopting the national arrest warrant must be a court within the meaning of Article 5(4) ECHR. This goes some way to confirming

35. When addressing the question raised by the referring court as to whether the lack of reference in the EAW to a pre-existing national arrest warrant (NAW) is to be understood in the sense that the executing judicial authority may refuse to give effect to it, the Court makes clear that while the executing judicial authority may refuse to execute an EAW only in the cases, exhaustively listed, of obligatory and optional non-execution laid down in Arts. 3, 4 and 4a of the FD-EAW, "the fact nevertheless remains that that those provisions are based on the premiss that the European arrest warrant concerned will satisfy the requirements as to the lawfulness of that warrant laid down in Article 8(1) of the Framework Decision"; Case C-241/15, *Bob-Dogi*, para 63.

the point made in the introduction: in the Court's view, "judicial authority" and the existence of judicial remedies are two sides of the same coin.

In *Bob-Dogi*, the Court paves the way for a greater erosion of national procedural autonomy, as it stresses the importance of involving a court in making an initial decision on deprivation of liberty. That a decision on a national arrest warrant shall be taken by a "court" is not only an obvious consequence of fundamental rights obligations (including Art. 6 CFR), but follows from an in-context interpretation of EU secondary law. As Advocate General Bot makes clear in his Opinion in *Bob-Dogi*, the rule that a "European arrest warrant should be based on the existence of a judicial decision adopted in compliance with the procedural rules of the issuing Member State" is meant to avoid "the risk of depriving a person of the safeguards associated with the intervention of a court, as the guardian of individual freedoms".[36] After all, a procedural rule – like the one at issue in *Bob-Dogi* – that merges a national and a European warrant would make it impossible for the requested person to challenge the coercive measure adopted on the basis of domestic law, thereby impairing the right to *habeas corpus* as per Article 5(4) ECHR.

4. The development of an autonomous concept of "judicial authority" and the growing limits to procedural autonomy: A negative obligation?

In *Poltorak*,[37] *Özçelik*[38] and *Kovalkovas*,[39] the ECJ builds on the "dual level" doctrine to develop an autonomous concept of "judicial authority" under the FD-EAW.[40] Evidently, this case law provides important elements to define the scope of the right to effective judicial protection in the context of surrender proceedings. The three cases originate from preliminary references issued by the District Court of Amsterdam (*Rechtbank Amsterdam*). In *Poltorak* and *Kovalkovas,* the referring court asked for clarification of the concept of "issuing judicial authority" within the meaning of Article 6(1) FD-EAW. The preliminary references drew on the premiss, expressed by the ECJ in *Bob-Dogi* and *Jeremy F*, that the requested person has a right to judicial protection, both in the context of the surrender proceedings and in the national

36. Opinion in Case C-241/15, *Bob-Dogi*, EU:C:2016:131, para 75.
37. Case C-452/16 PPU, *Poltorak*, EU:C:2016:858.
38. Case C-453/16 PPU, *Özçelik*, EU:C:2016:860.
39. Case C-477/16 PPU, *Kovalkovas*, EU:C:2016:861.
40. Harkin, "The case law of the Court of Justice of the European Union on 'judicial authority' and issuing European arrest warrants", 12 NJECL (2021), 508–530; Ochnio, "Why is a redefinition of the autonomous concept of an 'issuing judicial authority' in European arrest warrant proceedings needed?", 5 *European Papers* (2020), 1305–1324.

procedure leading to the issue of a national arrest warrant. On this basis, the ECJ was asked to clarify whether the Swedish police board (in *Poltorak*) and the Ministry of Justice of Lithuania (in *Kovalkovas*) could qualify as "issuing judicial authority". In *Özçelik*, the question pertained to the interpretation of Article 8(1)(c) FD-EAW with a view to ascertaining whether an arrest warrant issued by the police and later confirmed by a public prosecutor in Hungary could be regarded as a "judicial decision" within the meaning of that provision.

The rulings in the three cases add very crucial findings to the existing case law. The key question across the different rulings was whether the ECJ may forge an autonomous concept of "issuing judicial authority" under EU law.[41] The requests issued by the referring court in the three procedures called on the ECJ to address provisions encroaching directly on national procedural autonomy. As the ECJ acknowledges in *Poltorak* and *Kovalkovas*, Article 6(1) FD-EAW refers to the law of the Member States "in accordance with the principle of the procedural autonomy of the Member State". Yet, this provision only allows discretion as to the choice of an authority with competence to issue an EAW. Accordingly, the reference to national law has no implications for the broader definition of the term "judicial authority" under EU law.[42] As Advocate General Campos Sánchez-Bordona observes in his Opinions, national procedural autonomy may not be relied on to widen arbitrarily the concept of "judicial authority".[43] After all, the definition of the term transcends the specific provision at issue and speaks to the very essence of the procedure designed by the EU legislature which is "judicial" in nature. Accordingly, in the Court's view, the term "judicial authority" contained in Article 6(1) FD-EAW cannot be left to the discretion of Member States and requires an autonomous and uniform interpretation throughout the Union.[44]

Against this background, the ECJ in *Poltorak* and *Kovalkovas* concludes that by taking into account the wording of the relevant provision, "its context" and "the objective" of the FD-EAW, the term "issuing judicial authority" must be understood as comprising exclusively "authorities that administer justice" in accordance with, and by virtue of, the principle of the separation of powers "which characterizes the operation of the rule of law".[45] It follows from this characterization of the term in question that administrative or police

41. See for a comment on the three rulings, Rosanò, "If you are a judicial authority and you know it, raise your hands – Case Note on C-452/16 PPU, *Poltorak*, C-453/16 PPU, *Özçelik*, C-477/16 PPU, *Kovalkovas*", 3 *European Criminal Law Review* (2017), 89–98.

42. Case C-452/16 PPU, *Poltorak*, para 30; Case C-477/16 PPU, *Kovalkovas*, para 31.

43. Opinion in Case C-452/16 PPU, *Poltorak*, para 65.

44. Case C-452/16 PPU, *Poltorak*, para 32; Case C-477/16 PPU, *Kovalkovas*, para 33.

45. According to the Opinion in Case C-452/16 PPU, *Poltorak*, para 39: "the adjective 'judicial' brings to the noun it accompanies the connotation that that authority has to belong to

authorities (such as those at issue in *Poltorak*) or ministries and other government organs (such as in *Kovalkovas*) cannot be regarded as falling within Article 6(1) FD-EAW. To corroborate this argument, the Court, in a somewhat circular way, picks up on its findings in *Bob-Dogi* and recalls the premiss underlying the principle of mutual recognition. For mutual confidence to be "earned", a judicial authority must intervene "prior to the execution of the European arrest warrant, for the purposes of exercising its review".[46] In other words, the ECJ refers to the "second level" of judicial protection which must be ensured by the competent authority of the issuing Member State, *inter alia* through a proportionality test.[47] Hence, in a significant blow to national procedural autonomy, the ECJ recognizes that EU secondary law constrains national discretion, forcing existing procedural rules such as those conferring the status of issuing authority on non-judicial actors to be set aside.

Remarkably, the case of *Özçelik* allows the ECJ to operationalize the notion of "judicial authority" in relation to the specific instance of a national arrest warrant issued by the police and later confirmed by the Hungarian public prosecutor. In this context, in order to avoid inconsistencies between different provisions in the FD-EAW, the Court connects its definition of "judicial authority" to the notion of "judicial decision" under Article 8(1)(c) FD-EAW. Accordingly, the ruling concludes that where the public prosecutor's office constitutes an authority responsible for administering criminal justice,[48] the decision of such an authority (to validate a warrant issued by the police) "must be regarded as a judicial decision, within the meaning of Article 8(1)(c) of the Framework Decision".[49] This rather laconic conclusion opens the door to further questions, revolving around the identification of the requirements a prosecutor must meet to qualify as an authority "participating in the administration of justice". A further issue in this respect is whether (and under what conditions) a public prosecutor's office subordinate to the "executive power", as per the organization of the judicial system in a Member State, may still qualify as a "judicial authority". In *Özçelik*, the Court's ruling does not

the administration of justice, as opposed, in accordance with the traditional separation of powers, to the legislative and executive powers".

46. Case C-452/16 PPU, *Poltorak*, para 44.

47. Though this aspect is not explicitly elaborated on in the judgment, A.G. Campos Sánchez-Bordona in his Opinion in *Poltorak*, para 38, refers to the need for a proportionality review by the issuing authority, even when an EAW is issued for the purposes of enforcing a judgment. See also Council Document 17195/1/10 REV 1, Revised version of the European handbook on how to issue a European arrest warrant, of 17 Dec. 2010, p. 14, in which the issuing authorities are urged to carry out a proportionality test before issuing the EAW.

48. Case C-486/14, *Kossowski*, EU:C:2016:483, para 39.

49. Case C-453/16 PPU, *Özçelik*, para 34.

engage with this aspect, nor with the broader question of what makes a prosecutor "independent". After all, the Hungarian authorities had provided solid assurances about the independence of the public prosecutor from the executive. In addition, the question of what criteria define the prosecutor as a "judicial authority" had not been raised by the referring court.[50]

More problematically, in *Özçelik*, the ECJ fails to address the question of whether an arrest warrant issued by the police, and later endorsed by a prosecutor, meets all the requirements of effective judicial protection. In the Court's view, the prosecutor's decision to validate a warrant issued by the police under Hungarian law is tantamount to "a judicial approval"[51] and may be regarded as a judicial decision within the meaning of Article 8(1)(c). It is, however, far-fetched to claim, as the Court does, that the mere existence of such a decision justifies the "high level of confidence" between the Member States.[52] In the event of a national arrest warrant based on a coercive measure falling within the scope of Article 5(3) ECHR (arrest or remand in custody), the guarantees of *habeas corpus* are fulfilled when initial detention is ordered *or* confirmed "promptly" by a court. In this respect, the ECtHR case law has set out stringent requirements to narrow down the notion of "court" for the purpose of *habeas corpus* proceedings. This term refers primarily to "bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and the parties to the case",[53] but includes the safeguards of a judicial procedure of adversarial nature and the right to be heard at an oral hearing. More importantly, the judicial authority before which the arrested person is brought, must have the ability to review the lawfulness of detention,[54] including the grounds for arrest or police custody such as the existence of a reasonable suspicion.

Ostensibly, the ECJ has avoided carrying out an assessment of these aspects in light of the ECHR, possibly in order to accommodate different national practices.[55] Yet, the possibility for a national judicial authority to review the merits of detention should form an integral part of the "first level of

50. Harkin, op. cit. *supra* note 40, 511; Rosanò, op. cit. *supra* note 41, 98. See, however, the Opinion in Case C-453/16 PPU, *Özçelik*, para 62, which finds that a prosecutor may qualify as a judicial authority only, it appears, for the purpose of issuing a national arrest warrant.

51. Case C-453/16 PPU, *Özçelik*, para 36.

52. Case C-452/16 PPU, *Poltorak*, para 45.

53. ECtHR, *Weeks* v. *United Kingdom,* Appl. No. 9787/82, judgment of 2 March 1987, para 61; ECtHR, *De Wilde, Ooms and Versyp* v. *Belgium*, Appl. Nos. 2832/66, 2835/66, 2899/66, judgment of 18 Nov. 1970, Series A no. 12, pp. 41–42, paras. 76 and 78.

54. ECtHR, *Medvedyev and others* v. *France*, Appl. No. 3394/03, judgment of 29 March 2010, para 124.

55. Mitsilegas, "Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice", 57 CML Rev. (2020), 65.

protection" outlined in *Bob-Dogi*.[56] In sum, based on the ruling in *Özçelik*, it remained unclear whether public prosecutors – regardless of their independence and impartiality – may always issue a "judicial decision" in the absence of a subsequent judicial review before a judge or a court. The uncertainty affecting the position of the ECJ in this case ultimately waters down the importance of the stance taken in *Poltorak* and *Kovalkovas*. While developing an autonomous concept of "judicial authority" under EU law, these cases have effectively created a negative obligation on Member States to expunge national provisions appointing non-judicial bodies as "issuing authorities"; this, in spite of the lack of direct effect characterizing framework decisions. While the findings in *Poltorak* and *Kovalkovas* are relatively bold as to their effects for procedural autonomy, the interpretation espoused in *Özçelik* is problematic primarily for its lack of references to specific procedural guarantees protecting the right to liberty. As we will see in the next section, the ambiguity of this approach casts a shadow on the subsequent case law on the "dual level of protection".

5. What role for public prosecutors? Focusing on judicial independence and the making of positive obligations to ensure "effective judicial protection"

As explained in the previous section, in *Poltorak* and *Kovalkovas* the ECJ declared the incompatibility with EU law of national provisions designating non-judicial bodies as issuing authorities. These rulings determine a negative obligation, as Member States are under a duty to ensure that their legislation is in conformity wth the findings of the Court's case law. This obligation requires expunging domestic provisions enabling non-judicial authorities to make decisions about the issue or the execution of an EAW. Expanding on this case law, the ECJ took a further and decisive step in *OG & PI* and *PF*.[57] These judgments address the sensitive question of whether public prosecutors can be regarded as a "judicial authority". After all, although the Court has moulded its definition of "independence" on the separation of powers, the dividing line between the different elements of the *trias politica* is often blurred. The status of the public prosecutor's office in several Member States is a case in point.

56. As explained, this can be inferred from the Opinion in Case C-241/15, *Bob-Dogi*, para 75.

57. Joined Cases C-508/18 and 82/19 PPU, *OG & PI*, EU:C:2019:456; Case C-509/18, *PF*, EU:C:2019:457.

While its functions pertain with almost no exceptions to the "administration of justice", other institutional features vary widely across jurisdictions.[58] These include training, recruitment, internal structure, and, more importantly, the relationship of dependence/independence with the executive. From this perspective, prosecutors are often portrayed as quintessentially hybrid figures that belong to the *pouvoir judiciaire*,[59] but may present some traits of subordination to the executive.[60] The degree of independence from the central or local government is functional in nature and concerns predominantly the definition of priorities of criminal policy and law enforcement. Yet, in some instances the interference of government officials with prosecutorial decision-making may be more pervasive and case-specific.[61]

In the two cases at issue, the Irish Supreme Court was asking whether the notion of "issuing judicial authority" includes a public prosecutor's office when the latter is subject to instructions from the executive. Most notably, the referring court's main question was whether two German Public Prosecutors' Offices in Lübeck and Zwickau (*OG & PI*)[62] and the Prosecutor General of Lithuania (*PF*)[63] could be regarded as issuing judicial authorities within the meaning of Article 6(1) FD-EAW. Comparing the two cases is instructive in that it illustrates the features a prosecutor must possess to validly issue an EAW.[64] While addressing the preliminary references sent by the Irish Supreme Court, the ECJ reiterates its view that under EU law the term "judicial authority" is understood in relatively broad terms. As expressed in *Poltorak* and *Kovalkovas*, this concept includes "authorities of a Member State which, although not necessarily judges or courts, participate in the administration of

58. See *inter alia* Gilliéron, *Public Prosecutors in the United States and Europe. A Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Springer, 2014); Marguery, *Unity and Diversity of the Public Prosecution Services in Europe: A Study of the Czech, Dutch, French and Polish Systems* (Rijksuniversiteit Groningen, 2008).

59. Jean, "Ministères de la Justice et ministères publics en Europe", 1 *Les cahiers de la justice* (2016), 63–74.

60. Hodgson, "The democratic accountability of prosecutors in England and Wales and France: Independence, discretion and managerialism" in Langer and Sklansky (Eds.), *Prosecutors and Democracy: A Cross-National Study* (Cambridge University Press, 2017), p. 77: in France, "the unelected judiciary remains subordinate to political power within this 'statist' tradition, reflected in the hierarchical accountability to the Minister of Justice and in the constitutional status of the judiciary as authority rather than power".

61. Gilliéron, op. cit. *supra* note 58, p. 313.

62. Joined Cases C-508/18 and 82/19 PPU, *OG & PI.*

63. Case C-509/18, *PF.*

64. As to the notion of invalidity (as "legal non-existence") of the EAW issued in the absence of a prior judicial decision, Mancano, "You'll never walk alone. A systemic assessment of the European arrest warrant and judicial independence', 58 CML Rev. (2021), 683–718.

criminal justice in that Member State".[65] Similarly, the ECJ's reasoning builds on the distinction between a first and a second level of protection within surrender proceedings. Here the ECJ adds to its previous findings, detailing what is required for prosecutors to qualify as an issuing judicial authority. Prompted by the questions raised by the referring court, the ECJ elaborates particularly on the concept of "judicial independence".

The criteria to establish whether a public prosecutor qualifies as an issuing judicial authority are twofold. On the one hand, a non-judicial issuing authority must be "participating in the administration of justice". The lack of the status of "court" does not prevent public prosecutors from being regarded as issuing judicial authorities insofar as they take part in criminal proceedings and make determinations regarding the prosecution of persons suspected of having committed a criminal offence (as is the case under German criminal procedure). This broad-spectrum definition reflects the scope of the FD-EAW which applies to both pre-sentence proceedings and final decisions in criminal matters.[66] As prosecutors play a role in the different segments of the criminal process and issue decisions which may be the subject of an EAW, it is logical that these bodies fall "within the scope of the framework decision" and may in principle qualify as issuing authorities. In Germany, prosecutors have the power to issue indictments and initiate criminal prosecution. In addition, prosecutors are under a duty to open investigations, by virtue of the principle of mandatory prosecution (or principle of legality), when they collect or receive information that a person is suspected of having committed a criminal offence. It is therefore undisputed that prosecutors participate in the administration of justice under national law.

On the other hand, a judicial authority within the meaning of Article 6(1) FD-EAW must meet a threshold of judicial independence. This key requirement is explained only partially by the ECJ in *OG & PI* and *PF*, as these judgments fail to clarify exhaustively the criteria according to which a prosecutor may be regarded as a "judicial authority". Arguably, one can distinguish two meanings of the term "independence", which to a large degree are borrowed from the ECtHR case law on Article 6 ECHR.[67] On the one hand, judicial bodies must display independence *vis-à-vis* the parties to the criminal proceedings. On the other, the notion may be conceptualized as "independence" from the executive. Such an element entails the ability to

65. Joined Cases C-508/18 and 82/19 PPU, *OG & PI*, para 51.

66. Ibid., para 54; Case C-509/18, *PF*, para 35.

67. Müller, "Judicial independence as a Council of Europe standard", 52 *German Yearbook of International Law* (2009), 461–478.

make decisions without direct or indirect interferences from a ministry of justice or from other government bodies. In the cases at issue, the ECJ seems to focus merely on the latter understanding of the term "independence". Bearing in mind that the EU surrender system is designed to minimize the influence of the executive on judicial cooperation, the crucial element in the Court's approach to judicial independence is the requirement that the issuing judicial authority exercises its tasks objectively without being exposed to "external directions or instructions, in particular from the executive, such that it is beyond doubt that the decision to issue a European arrest warrant lies with that authority and not, ultimately, with the executive".[68]

An executing authority has the obligation to verify that the issuing body meets these requirements.[69] Evidently, the burden of proof is on the issuing authority. The ECJ clarifies that such an authority must be able to provide assurances about its level of independence.[70] Yet, the executing authority may not satisfy itself with a mere statement of principle. The independence of a prosecutor must be apparent from the relevant statutory rules and the institutional framework governing its functions. Notably, such assurances must guarantee that a decision to issue an EAW is taken solely by the relevant "judicial authority" without external interferences. The premiss behind this requirement concerns the delicate task allocated to issuing authorities within the dual level of protection designed by the FD-EAW. The decision to issue an EAW paves the way for deprivation of liberty in a cross-border context, with the corresponding obligation for the executing authority to arrest the requested person. The ECJ seems mindful of this peculiarity of the EU surrender system as it requires a second level of protection "even where the European arrest warrant is based on a national decision delivered by a judge or a court".[71] Accordingly, the Court goes on to clarify the content of such judicial review. An additional layer of oversight is needed to verify whether the conditions for issuing an EAW are respected (lawfulness). At the same time, the issuing authority must examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant (proportionality).

Hence, when national provisions confer the power to issue an EAW on a body which is not itself a "judge or a court", the issuing decision and *inter alia* the proportionality of such a decision "must be capable of being the subject, in the Member State, of court proceedings which meet in full the requirements

68. Joined Cases C-508/18 & 82/19 PPU, *OG & PI*, para 73.

69. To this end, executing authorities must engage in a dialogue with the issuing bodies. See Mitsilegas, op. cit. *supra* note 55, 703.

70. Joined Cases C-508/18 and 82/19 PPU, *OG & PI,* para 74.

71. Ibid., para 72.

inherent in effective judicial protection".[72] While phrased rather obscurely by the ECJ at paragraph 75 of the judgment in *OG & PI*, this requirement offers a supplementary safeguard which must be met when it appears that the issuing authority, though displaying a minimum level of independence of the executive, is not itself a court. This procedural condition is to be kept distinct from the qualification of the issuing authority as a "judicial authority". As the ECJ made clear in the follow-up judgment in *JR & YC*, the existence of a judicial remedy against the decision taken by an authority other than a court is not a condition for classifying that authority as a judicial body within the meaning of Article 6(1) FD-EAW; these procedural rules are instead an element which may affect the lawfulness of the procedure of issuing a warrant.[73] It may be argued that both in the case of a non-judicial authority issuing the EAW and in the case of a lack of judicial remedies giving rise to "court proceedings", the request should be declared invalid by the executing authority.

Be that as it may, in *OG & PI* and in *PF*, the dispute revolved around the relationship between prosecutors and the ministry of justice, as it appeared that the latter could issue instructions with respect to the specific case, thus influencing a prosecutor's decision to issue or not to issue an EAW. In *OG & PI*, the ECJ concluded that the public prosecutors' offices of Lübeck and Zwickau could not be regarded as issuing judicial authorities within the meaning of Article 6(1) FD-EAW. The reasons for this interpretation are systemic and go to the very core of the judicial organization in a given Member State, as the status of the public prosecutor reflects that organization and the constitutional principles governing it. German prosecutors are in effect embedded within a hierarchical structure in which the Ministry of Justice of the relevant *Land* may exercise a power of direction and instruction in individual cases. By contrast, the Lithuanian Prosecutor General could validly issue an EAW, as that organ enjoys the benefit of independence conferred by the Constitution and the relevant statutory provisions governing the role of public prosecutors.[74]

It is not an exaggeration to say that the rulings in *OG & PI* and *PF* sent shockwaves throughout the Union, forcing several Member States to revise

72. Ibid., para 75.

73. Joined Cases C-566 & 626/19 PPU, *JR & YC*, EU:C:2019:1077, para 48. See also the Opinion in Joined Cases C-566 & 626/19 PPU, *JR & YC*, EU:C:2019:1012, para 70: "The need for such proceedings . . . is a condition relating to the lawfulness of the issuing of an EAW by a public prosecutor's office and, therefore, to its effectiveness."

74. However, the ECJ took care to add that it is for the executing authority to determine whether a decision of the Prosecutor General to issue an EAW may be "the subject of court proceedings which meet in full the requirements inherent in effective judicial protection". See Case C-509/18, *PF*, EU:C:2019:457, para 56.

their legislation implementing the FD-EAW. In Germany, the judgments prompted immediate action to transfer the issuing power to courts.[75] Initially, in the absence of specific rules, some courts took over the power to issue EAWs on the basis of existing (and rather broad) provisions of German law read in light of the ECJ's case law.[76] This interpretation was made necessary by the ruling in *OG & PI* as with "one decision, the CJEU rendered 5,600 pending EAWs issued by German public prosecutors invalid".[77] Similarly, legal changes transferring issuing powers from prosecutors to courts were made in Denmark and the Netherlands. In Lithuania, national provisions attributing such powers *inter alia* to the Ministry of Justice were repealed.[78] But the rulings in question may have had more profound implications. In Germany, the Court's case law has triggered a debate around the need to restructure the judicial organization and abolish the power to issue binding instructions, and in the Netherlands, though the competence to issue EAWs has been provisionally transferred to investigating magistrates, the Ministry of Justice is still exploring technical solutions to implement the ECJ's case law and revise the functional dependence of prosecutors from the executive.[79] More recently, in *AZ*, the ECJ has answered a preliminary reference issued by the District Court of Amsterdam adding that requirements of independence and effective judicial protection inform the notion of "executing judicial authority" on the basis of Article 6(2) FD-EAW.[80] A judicial remedy entailing a review in court is needed when an EAW is executed by an independent prosecutor.[81]

The consequences of this strand of case law illustrate how the principle of effective judicial protection may bite into national procedural autonomy, in spite of the fact that in these rulings the Court does not refer explicitly to

75. See Ambos, "The German Public Prosecutor as (no) judicial authority within the meaning of the European arrest warrant: A case note on the CJEU's judgment in *OG* (C-508/18) and *PI* (C 82/19 PPU)", 4 NJECL (2019), 399–407; Böse, "The European arrest warrant and the independence of public prosecutors: *OG & PI, PF, JR & YC*", 57 CML Rev. (2020), 1269.

76. Grimaldi, "Independence of public prosecutors' offices. Recent case law of the CJEU on the European arrest warrant and its impact on the EU criminal justice system", (2020) *Eucrim*, 333.

77. Niedernhuber, "How much independence is necessary", (2019) *European Criminal Law Review*, 6.

78. Milčiuvienė and Gruodytė, "The influence of the Court of Justice of the European Union on the issuance of European arrest warrants in Lithuania", 12 *Baltic Journal of Law & Politics* (2019), 97–114.

79. See the report by Ouwekerk et al., "De rol en positie van het openbaar ministerie als justitiële autoriteit in Europees strafrecht. Een verkennende studie naar een toekomstbestendige vormgeving van de rol en de positie van het openbaar ministerie in de EU-brede justitiële samenwerking in strafzaken", WODC (2021).

80. Case C-510/19, *AZ*, EU:C:2020:953, para 53.

81. Ibid., para 54.

Article 47 CFR (nor, for that matter, to Art. 19(1) TEU).[82] More specifically, the judgments in *OG & PI* and *PF* have set in motion a profound rethinking of the organization of justice in several Member States, shifting the balance of power as regards the power of issuing (and executing) EAWs. In *OG & PI* and *PF*, the erosion of national procedural autonomy takes the form of a combination of negative and positive obligations. On the one hand, it follows from these judgments that Member States must repeal national implementing provisions conferring issuing powers on prosecutors who fail to meet the required standards of independence. On the other hand, the rulings analysed in this section place a positive obligation on the executing authority, as they require ascertaining the degree of independence of the authority issuing the warrant. That obligation has a wide scope of application, in that it entails a duty to collect information and assess the existence of procedural requirements that guarantee effective protection in the State where the EAW is issued. A closer scrutiny of the safeguards applicable to a national warrant may also be required.[83] Although an EAW may be issued by prosecutors qualifying as "judicial authorities", their decisions must be subject to "court proceedings". In other words, an issuing decision must be amenable to judicial review in court when taken by a prosecutor.

While such a conclusion may give the impression that the ECJ has gone a long way to erode national procedural autonomy – especially by construing an autonomous notion of "judicial authority" – an overall look at the relevant case law leads to a more nuanced appraisal. In the next section, the most significant inconsistencies raised by the peculiar understanding of judicial independence – developed in *OG & PI* – are brought to the fore. Then, section 7 takes a closer look at the requirement that court proceedings should be available when the EAW is issued by a prosecutor. In both sections, it is argued that the Court has sought to mitigate the impact of its *dictum* on national law. Whereas this attitude partly boils down to a form of deference towards national autonomy, one can also explain it as an attempt to strike a balance between effective judicial protection and the relevant policy goals pursued by the FD-EAW and the Area of freedom, security and justice (AFSJ). This point is argued in more

82. However, the judgments in *OG & PI* and in *PF* contain references to Art. 6 CFR. For a discussion of this lack of reference to Art. 47 in the relevant cases discussed in this section, see Martufi, "Article 47 of the Charter and the European arrest warrant: Chronicle of a death foretold?" in Bonelli, Eliantonio and Gentile (Eds.), *Article 47 of the Charter and Effective Judicial Protection, Volume 1* (Hart, forthcoming 2022).

83. This obligation may stem from the *obiter dictum* where the ECJ states that "effective judicial protection" is to be found on "at least" one of the two levels of protection. Therefore, if the EAW is issued by a prosecutor, the executing body must verify whether a national decision may be subject to a review by a court, see Niedernhuber, op. cit. *supra* note 77, 13.

detail in section 6 which turns to the analysis of the Court's approach to judicial independence in EAW proceedings.

6. The Court's approach to "judicial independence": Inconsistencies and double standards

The emphasis on "independence" as a defining feature of the notion of "judicial authority" warrants further attention. Admittedly, this requirement is not new in the Court's case law. The ECJ has always listed "independence" (and impartiality) among the criteria to assess the quality of a "court or tribunal" for the purpose of Article 267 TFEU.[84] The Court has thus limited the scope of the preliminary ruling procedure to requests submitted by "a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law".[85] In this respect, the Court added that judicial independence is "essential for the proper working of the judicial cooperation system embodied by the preliminary mechanism under Article 267 TFEU". More recently, in the landmark case *Wilson*, the Court held that the very concept of independence is "inherent in the task of adjudication". Notably, on the basis of this consolidated case law, judicial independence entails two aspects: first, an aspect of "external independence", which refers to the absence of external pressure or influence; second, an aspect of "internal independence", which is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests.

Accordingly, the ECJ has ruled that the Italian Public Prosecutor's Office cannot be regarded as a "court or tribunal" for the purpose of making a preliminary reference. It is precisely the lack of "internal independence" which led the Court to bar the prosecutor in the case at issue from referring questions under Article 267 TFEU. As a matter of fact, the role of the Italian *Procura della Repubblica* is "not to rule on an issue in complete independence but, acting as prosecutor in the proceedings, to submit that issue, if appropriate, for consideration by the competent judicial body".[86] Under Italian criminal law, prosecutors are parties to the proceedings. On the other

84. Pech, "The right to an independent and impartial tribunal previously established by law under Article 47 of the EU Charter of Fundamental Rights" in Peers et al. (Eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart, 2021), available at <eprints.mdx.ac.uk/30243> (last visited 24 June 2022).

85. See Case C-506/04, *Wilson*, EU:C:2006:587, para 49; Case C-685/15, *Online Games and others*, EU:C:2017:452, para 60; Case C-403/16, *El Hassani*, EU:C:2017:960, para 40.

86. Case C-74/95, *Criminal proceedings against X*, EU:C:1996:491, paras. 19–20. See also ECtHR, *Vasilescu* v. *Romania*, Appl. No. 27053/95, judgment of 22 May 1998, paras. 40–41.

hand, the prosecutor in criminal proceedings is not performing an adjudicatory task as "it does not decide cases but brings them before the competent court or tribunal".[87] At the same time, the ECJ regards impartiality "as an internal component of the broader notion of independence". This guarantee requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[88] Overall, as laid down recently by the ECJ in a case involving the status of the newly established Disciplinary Chamber of the Polish Supreme Court, the principles of impartiality and independence must be secured through a set of rules that preclude "not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned".[89]

It follows that according to a long-standing interpretation of EU primary law, independence is an inherent feature of all "judicial bodies" and belongs to the essence of the right to a fair trial enshrined in Article 47 CFR.[90] The idea that independence must be regarded as implicit to the function of *ius dicere* was key in the "ground-breaking" decision in *ASJP*,[91] where the Court established a strong logical connection between the right to an effective judicial remedy in all fields covered by EU law (as set out in the second subparagraph of Art. 19(1) TEU) and the independence of courts and tribunals at the domestic level. In order for effective judicial protection to be ensured, maintaining the independence of national courts or tribunals is essential.[92] In other words, effective judicial protection – which applies irrespective of whether national authorities are implementing EU law – cannot be detached from the right to an independent tribunal in accordance with Article 47 CFR.[93] Significantly, when interpreting Article 19(1) TEU and Article 47 CFR, the ECJ relied on its case law on the notion of "court and tribunal" as per Article 267 TFEU. In doing so, the ECJ has provided an

87. Opinion in Case C-74/95, *Criminal proceedings against X*, EU:C:1996:239, paras. 6–9.

88. Case C-216/18 PPU, *LM*, para 65, and the case law cited; Case C-619/18, *Commission* v. *Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 73.

89. Joined Cases C-585, 624 & 625/18, *A.K. and others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, para 125. See also Case C-619/18, *Commission* v. *Poland*, para 112.

90. See in this respect Case C-216/18 PPU, *LM*, paras. 63 and 78. For a critique of the theory underpinning this ruling, see Wendel, "Mutual trust, essence and federalism. Between consolidating and fragmenting the area of freedom, security and justice after *LM*", 15 EuConst (2019), 25.

91. Case C-64/16, *Associação Sindical dos Juízes Portugueses (ASJP)*, EU:C:2018:117.

92. Pech and Platon, "Judicial independence under threat: The Court of Justice to the rescue", 55 CML Rev. (2018), 1827–1854.

93. Krajewski, "*Associação Sindical dos Juízes Portugueses*: The Court of Justice and Athena's Dilemma", 3 *European Papers* (2018), 395.

overarching notion of judicial independence under EU law; one that applies both to domestic proceedings falling within the scope of the Charter and/or the Treaties as well to the specific mechanism of judicial dialogue regulated by Article 267 TFEU.

Such a concept of judicial independence has been key to the ECJ's vigorous response to rule of law backsliding in some Member States.[94] Most notably, in cases concerning the notorious "judicial reforms" in Poland, the ECJ has built its findings on the assumption that lower and apex courts in that jurisdiction fall within the "system of legal remedies" in the fields covered by EU law within the meaning of the second subparagraph of Article 19(1) TEU. This approach has paved the way for a greater scrutiny of institutional reforms affecting the independence of the judiciary. On the one hand, the ECJ has been called on to pronounce on infringement procedures,[95] thus declaring some key parts of the Polish judicial reform (such as the disciplinary regime of judges)[96] contrary to EU law. On the other hand, in a growing series of preliminary rulings the Court has found numerous pieces of legislation to be incompatible with EU law,[97] drawing on the principle of effective judicial protection. The Court has repeatedly stated that while the organization of justice in the Member States falls within the competence of those Member States, when exercising this competence, domestic authorities are required to comply with their obligations deriving from EU law and, in particular, with the second subparagraph of Article 19(1) TEU. This provision should be read in conjunction with Article 47(2) CFR (right to a fair trial before an "independent court") thus requiring that national bodies that are competent to rule on questions concerning the application or interpretation of EU law, fulfil all guarantees of independence and impartiality.

Importantly, the Court's interpretation of judicial independence in light of Articles 19(1) TEU and Article 47(2) CFR, has influenced the approach to mutual recognition in the implementation of the FD-EAW. In *LM*, the Court concluded that a real risk of breach of the right to a fair trial, if confirmed in the individual case and on account of systemic deficiencies relating to the independence of courts, may lead to surrender proceedings being brought to

94. See for an early, and yet still topical, introduction to the topic, Pech and Scheppele, "Illiberalism within: Rule of law backsliding in the EU", 19 CYELS (2017), 3–47.

95. Case C-192/18, *Commission* v. *Poland* (Independence of the ordinary courts), EU:C:2019:924, para 112.

96. Case C-791/19, *Commission* v. *Poland*, (Régime disciplinaire des juges), EU:C:2021:596, paras. 113 and 157.

97. See, recently, Joined Cases C-748 & 754/19, *WB and others*, EU:C:2021:931, concerning the Polish regulations which allow the Polish Minister of Justice – who is also the Public Prosecutor General – to second judges to higher criminal courts and to terminate the secondments at any time without stating reasons.

an end.[98] The Court came to this conclusion recalling that the EAW system is based on:

> "the premiss that the criminal courts of the other Member States – which, following execution of a European arrest warrant, will have to conduct the criminal procedure for the purpose of prosecution, or of enforcement of a custodial sentence or detention order, and the substantive criminal proceedings – meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts".[99]

In other words, the independence of *courts* is a precondition for mutual recognition of custodial measures under EU law. The question therefore arises as to whether this notion of judicial independence could have been applied when interpreting the concept of "judicial authority". Though in *LM* the ECJ refers to the role of national courts in domestic criminal proceedings, it would be illogical to claim that judicial independence does not apply to "judicial authorities" involved in issuing or executing an EAW.[100] After all, as the Court recalls in *LM*, the decision to issue or execute an EAW must meet the requirements of effective judicial protection, including the guarantee of independence, so that the entire surrender procedure is carried out under judicial supervision.[101]

Unsurprisingly, Advocate General Campos Sánchez-Bordona found in his Opinion in *OG & PI* that under EU law, effective judicial protection is in effect "the protection provided by a judge".[102] This interpretation flows from the very definition of the task of judges, which is to ensure "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".[103] The Advocate General, thus, meant to reiterate the key finding that independence is inherent in the task of adjudicating. In addition, the Opinion distinguishes between the exercise of a "public authority" and the exercise of "jurisdiction" which, in a State governed by the

98. See in this respect Case C-216/18 PPU, *LM*, para 78.

99. Ibid., para 58.

100. *Contra:* Mancano, op. cit. *supra* note 64, 713: "The public prosecutor's office is not bound by the obligations of independence and impartiality that Article 6 imposes on a 'tribunal' unless they are acting as judicial officers in charge of review under Article 5(3) ECHR – which is different from issuing an EAW." This is disputable, however, as guarantees of judicial protection stemming from Art. 5(4) ECHR apply to all forms of deprivation of liberty.

101. It is telling (as Harkin noted) that the ECJ in *LM* refers to its interpretation of Art. 6(1) FD-EAW in Case C-477/16 PPU, *Kovalkovas*; see Harkin, op. cit. *supra* note 40, 526.

102. Opinion in Joined Cases C-508/18 & 82/19 PPU, *OG & PI*, para 66.

103. Ibid., para 66.

rule of law, "is the exclusive domain of the judges and courts that make up the judicial branch of the State".[104] Prosecutors may exercise a "public authority", but they are not conferred a jurisdictional power. Admittedly, while taking part in the administration of justice, prosecutors may be bound by a requirement of independence, impartiality and objectivity, yet their independence must always be reconciled with the pursuit of specific interests, such as law enforcement and crime prevention. By contrast, the judiciary does not pursue specific policy goals, its only task being to defend the integrity of the legal system. The independence of courts and judges is functional to the overarching task of protecting the legal system and may not be weighed against any other policy goal.

This argument supports the view that the concept of "issuing judicial authority" should not encompass public prosecutors, irrespective of their classification or status under national law.[105] Notably, when the exercise of a public authority may interfere with the right to liberty, the concept of judicial authority is to be understood as a synonym of "judicial branch". As a result, the interpretation proposed by Advocate General Campos Sánchez-Bordona in both *OG & PI* and *PF* was to require that EAWs may only be issued (and executed) by a "court or tribunal" within the meaning of Article 267 TFEU and Article 47 CFR. In this perspective, the different degree of dependence/independence from the executive, which may vary under national law, would be irrelevant. The independence of prosecutors reflects a duty of objectivity and impartiality that is characteristic of other administrative authorities.[106] At the same time, linking the concept of "judicial authority" to guarantees normally attached to the notion of "court or tribunal" under EU law would prevent such judicial authorities from being exposed to internal influences, that is from within the judiciary. This requirement of "internal independence" stems from the right to a fair trial under Article 6 ECHR, as a dynamic interpretation of the Convention requires judges to be shielded, *inter alia*, from pressure exerted by other judges or judicial officials within the judiciary.[107] Such a development results from the "idea that the separation of

104. Ibid., para 33.

105. Opinion in Joined Cases C-508/18 & 82/19 PPU, *OG & PI*, para 84, fn. 51: "The independence of the judicial branch is, like the courts themselves, in the service of the integrity of legal system, exclusively." See also Opinion in Case C-509/18, *PF*, EU:C:2019:338, paras. 24–29, in particular para 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."

106. Opinion in Case C-509/18, *PF*, para 28.

107. ECtHR, *Parlov-Tkalčić* v. *Croatia*, Appl. No. 24810/06, judgment of 22 Dec. 2009, para 86.

powers itself does not sufficiently guarantee the independent administration of justice".[108]

However, while interpreting Article 6(1) FD-EAW, the ECJ rejects the understanding proposed by the Advocate General. As a matter of fact, the Court confines itself to a definition of "independence" whose traits reflect exclusively a conceptual demarcation between the executive and the judiciary. This approach ends up being minimalistic, as it fails to grasp the multi-dimensionality of the notion of "independence" developed by the ECtHR under Article 6 ECHR.[109] In *OG & PI*, the Court only refers to a risk of "external directions or instructions, in particular from the executive", thus admitting that "independence" in this case does not prevent issuing judicial authorities from receiving instructions issued by higher officials within the judiciary. This aspect has been clarified in a subsequent judgment where the independence of French prosecutors was under scrutiny.[110] Drawing on its previous findings, the Court adds that while the requirement of independence means that "powers of public prosecutors cannot be subject to instructions from outside the judiciary", it does not prohibit internal instructions which may be given to public prosecutors by their superiors on the basis of the hierarchical relationship underpinning the organization of the Public Prosecutor's Office.[111]

Clearly, not every instruction is prohibited, but only those resulting in directions given to a prosecutor in an individual case, most notably to orient a decision regarding the lawfulness and proportionality of an EAW. This particular aspect is central to the ECJ's reasoning and explains why the ruling in *JR & YC* concedes that prosecutors may be subject to "general instructions". The Court notes that the Ministry of Justice in France is capable of issuing only general instructions in order to ensure a consistent application of the law throughout the territory. In *JR & YC*, in particular, the ECJ accepts the contention (expressed by the French Government in its submissions before the Court) that "under no circumstance" may general instructions have the

108. Sillen, "The concept of 'internal judicial independence' in the case law of the European Court of Human Rights", 15 EuConst (2019), 104–133.

109. Interestingly, this jurisprudence has an impact on the case law of the ECJ concerning the notion of "court or tribunal" under Art. 267 TFEU and Art. 47 CFR. Yet in the cases commented on above, little reference is made to Art. 6 ECHR and the right to a fair trial. The choice is somewhat surprising as in *LM*, the ECJ went so far as to claim that "judicial independence" forms part of the essence of the fundamental right to a fair trial.

110. Joined Cases C-566 & 626/19 PPU, *JR & YC*.

111. Ibid., para 56. Pursuant to Art. 36 of the French Code of Criminal Procedure, the leading public prosecutor at the helm of a public prosecutor's office may issue written instructions directing a subordinate prosecutor to commence criminal proceedings or make written submissions to the competent court.

effect of influencing the choice as to the necessity or proportionality of an EAW.[112] This point seems debatable, however, as in practice a power to issue general instructions may well be abused to determine a specific outcome in criminal proceedings.[113] Be that as it may, the approach to judicial independence in this strand of the Court's case law seems exclusively concerned with limiting the influence of the executive on decision-making. While this solution may be enough to salvage the *raison d'etre* of the EAW (the "depoliticization" of judicial cooperation), it paves the way for an unjustified double standard of "judicial protection".

The emergence of this double standard lays bare the real concern of the ECJ in forging an autonomous notion of "judicial authority": finding an equilibrium between judicial protection and the enhancement of policy goals underpinning judicial cooperation in criminal matters. Clearly, embracing a narrow view of what makes a "judicial authority" – along the lines of the case law on "judicial independence" – would have ruled out the role of prosecutors as issuing authorities in all instances; that is, regardless of their degree of dependence from the executive. Pragmatically, the choice of including prosecutors within the notion of "judicial authority" has been regarded as necessary to avoid an operational paralysis of the EAW system.[114] As noted above, this shows an intention to strike a balance between effective judicial protection and the relevant policy goals pursued by the FD-EAW. At the same time, as prosecutors occupy a prominent role under national law in both the investigation stage of criminal proceedings and in the enforcement of sentences, it is only logical that they are involved in the adoption of warrants against suspects and convicted persons abroad. From this point of view, the deviation from the broader understanding of "judicial independence" may be regarded as a pragmatic acknowledgement of the impact that rulings such as *OG & PI* have on the internal coherence of the domestic criminal justice process and the relevant procedures of judicial cooperation.

7. Unpacking the "dual level doctrine": The right to liberty and the new concerns for procedural autonomy

This section turns to the issue of judicial remedies. As noted above, the right to a remedy should be regarded as a key component of effective judicial protection in surrender proceedings. Yet, the solution proposed by the ECJ in

112. Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 54.

113. Opinion in Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 40; see also Böse, op. cit. *supra* note 75, 1278; Niedernhuber, op. cit. *supra* note 77, 22.

114. Mitsilegas, op. cit. *supra* note 55, 68.

the context of its "dual level doctrine" is far from conclusive and requires further scrutiny. Most notably, the approach ushered in with the judgments in *OG & PI* and *PF* lends itself to criticisms from the point of view of *habeas corpus* guarantees. Undoubtedly, the fact that the rulings commented on above mention explicitly Article 6 CFR and the right to liberty is a step forward compared to prior case law on effective judicial protection in EAW proceedings. While accepting that prosecutors may qualify as "judicial authorities", the Court took care to add an extra layer of procedural safeguards. It did so by requiring that when EAWs are issued by an authority other than a judge or a court, "whilst participating in the administration of justice and having the necessary independence from the executive",[115] their decisions shall be subject to court proceedings meeting the requirements of judicial protection. Evidently, this requirement aims at strengthening procedural safeguards at the "second level" of judicial protection, involving the issuing of an EAW and, particularly, the assessment of proportionality of such a warrant.[116] The Court, however, also added the quite ambiguous statement that

> "as regards a measure, such as the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, enshrined in Article 6 of the Charter of Fundamental Rights of the European Union, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, *at least*, at one of the two levels of that protection".[117]

This sentence seems to contradict the paragraphs where the ECJ holds that it is incumbent on issuing authorities to ensure a "second level of protection" *in any case*; that is to say even where the issuing judgment is based on "a national decision delivered by a judge or a court".[118] Similarly, it has been argued that the requirements of independence and that of effective judicial protection are "mutually exclusive".[119] Consequently, it remained unclear whether the requirement laid down in paragraph 75 of the judgment in *OG & PI* (the possibility to review the issuing decision in court) would apply to an

115. Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 63.

116. Such proceedings "serve to ensure that the monitoring of compliance with the conditions to be met when issuing a European arrest warrant in connection with criminal proceedings and, in particular, the proportionality of such a warrant is carried out in a procedure which complies with the requirements of effective judicial protection", ibid., para 63.

117. See Joined Cases C-508/18 & 82/19 PPU, *OG & PI*, para 68 (emphasis added); Case C-509/18, *PF*, para 46.

118. Ibid., para 72.

119. See to this effect the questions raised by the referring court (the District Court of Amsterdam) in *JR and YC,* para 2.10, fourth subparagraph, of the order for reference.

EAW based on a national warrant issued in proceedings involving a judge or a court. At the same time, the rulings in *OG & PI* and *PF* did not provide enough clarity as to the need for a review of the national warrant by a court within the meaning of Article 5(4) ECHR. The ambiguous requirement that effective judicial protection shall be present *at least* on one of the two levels seemed to pave the way for a configuration where a single court decision may be taken exclusively at the second level of protection.[120] All in all, the interdependence between the two layers of protection remained problematic, with lingering questions regarding the possibility of an "incorporation" of one of the levels of judicial protection by the other.

Admittedly, ever since the development of the "dual level doctrine", the Court has given the impression that it conceives of the two layers of protection of the right to liberty as "complementary" and not "alternative".[121]

However, in recent cases a shift in the Court's case law is noticeable. While these two layers appeared distinct and complementary in *OG & PI* and *PF*, recent judgments show a tendency to conflate them.[122] In particular, in *JR & YC* the Court recognizes that as a national arrest warrant and the EAW are issued concomitantly, a prior judicial review carried out by the investigating court at the time of issuing a national warrant may also cover the grounds for issuing an EAW.[123] In other words, the national court may review the lawfulness and the proportionality of an EAW when issuing a national warrant. On this basis, the relevant court may then request that the prosecutor issues a certificate under the FD-EAW. However, the Court implicitly acknowledges that such prior review may not be enough to fulfil the requirement of effective judicial protection. The ruling in *JR & YC* notes that under French law, an EAW may always be subject to "court proceedings" through an action of invalidity filed (pursuant to Art. 170 of the French Code of Criminal Procedure) against the decision of the prosecutor. Such a motion may be submitted before surrender when the requested person is a party to the proceedings. If the EAW is issued against a person who is not yet a party to the proceedings, such an appeal may only be filed after surrender and the appearance before the investigating judge.[124]

120. Niedernhuber, op. cit. *supra* note 77, 13: "The first option is that a judge or court decides on the second level, being the judicial authority which is ultimately responsible for issuing the EAW. In this case, it is up to the Member States to decide on which of the two levels judicial recourse shall be possible". See, however, the recent case of *PI*; Case C-648/20 PPU, *PI*, EU:C:2021:187.

121. See Case C-241/15, *Bob-Dogi*, para 56.

122. See, for a similar claim, Harkin, op. cit. *supra* note 40, 525.

123. Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 68.

124. Ibid., para 70.

Similarly, in *XD* the ECJ found that the second level of protection is in essence incorporated in the judicial review carried out by the domestic court issuing the national warrant.[125] In Sweden, the ultimate act to issue an EAW for the purpose of criminal proceedings is taken by prosecutors on the basis of a prior decision of provisional detention made by a court. Under Swedish law, when issuing an order of provisional detention, the relevant court must also assess the proportionality of an EAW. This reflects the obligation for prosecutors to request an EAW as part of the application for coercive measures against a person not residing in the issuing State. Therefore, the assessment of the grounds for deprivation of liberty in such instances automatically covers the review of lawfulness and proportionality of the EAW. By the same token, under Swedish law, the national warrant and the EAW are "merged" from the point of view of the available remedies. The person concerned may appeal against the national warrant in order to obtain the annulment of the contested provisional detention. If such a decision is annulled, the EAW is automatically declared invalid. The appeal can be filed before or after the arrest in the executing State. The ECJ accepts the existence of a remedy against the national warrant as a sufficient ground to trigger "court proceedings" involving the lawfulness or proportionality of the EAW as per paragraph 75 of *OG & PI*.[126]

In both cases, the ECJ's attitude conflates the two levels of protection. In claiming that "the system" meets the requirement of effective judicial protection, the Court draws on provisions allowing a prior judicial review and a subsequent remedy which are not specifically for the EAW, but concern primarily the national arrest warrant. In doing so, the rulings depart from the Opinions of Advocate General Campos Sánchez-Bordona, which by contrast pointed to a lack of effective judicial protection at the "second level".[127] In particular, a judicial review of decisions to issue both a national warrant and an EAW – the Advocate General finds – may become outdated with the passing of time if the latter is not issued *simultaneously* or *almost concomitantly*, but *long after* the former.[128] In particular, a risk exists that as new circumstances emerge, issuing an EAW may no longer be proportionate. In a similar vein, the Advocate General sheds light on the different functions performed by the review of proportionality at the two levels of protection. In doing so, the Opinion draws significantly on a ruling issued by the ECJ in October 2019, in *NJ*,[129] where the Court was called on to assess the status of

125. Case C-625/19 PPU, *XD*, EU:C:2019:1078, para 53.
126. Ibid., para 52.
127. Opinion in Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 85.
128. Ibid., para 80.
129. Case C-489/19 PPU, *NJ*, EU:C:2019:849.

Austrian prosecutors as issuing authorities. The ruling in *NJ* recalls that a court's decision at the first level must review exclusively the proportionality of a deprivation of the right to liberty. In contrast, a decision at the second level must consider the proportionality of impinging on the rights of the person concerned beyond the right to liberty.[130] To that end, the judge must assess the effects of the EAW on the social and family relationships established by the requested person in the executing Member State.[131]

While the Opinion and the Court's ruling in *NJ* emphasize the substantial difference between the two levels of protection, the judgments in *JR & YC* and *XD* defer to the safeguards in place at the time of issuing the national warrant. Even more significantly, in the case of *ZB*[132] the Court found that in the event of an EAW issued for the purpose of enforcing a sentence, the necessary judicial review pursuant to paragraph 75 of *OG & PI* is carried out by national legal proceedings leading to an enforceable judgment.[133] It is therefore irrelevant to the level of protection whether or not national law provides for an appeal against the decision to issue such a warrant. Once again, the ECJ defers to national law and relies implicitly on the "doctrine of incorporation" as per Article 5(4) ECHR.

In other words, two distinct approaches to "judicial protection" cohabit within the Court's case law on the EAW. The first approach underscores the difference between the two levels of protection, thereby requiring the involvement of a court or tribunal both when ordering a national warrant and at the time of issuing an EAW. The second approach tends to blur the line between the two levels, thus accepting that a lack of judicial oversight at the "second level" may be compensated by the involvement of a court or tribunal at the time of issuing the national decision on which the EAW is based. The former understanding is the most sensible as it accepts that the EAW has implications for individual rights in its own right. Such effects on individual liberties might not be covered by the initial decision to issue a national arrest warrant. The latter understanding of the term "judicial protection" is minimalistic, and suggests that the two levels are interchangeable.

Significantly, in *JR & YC, XD* and *ZB*, the stance taken by the Court reflects a renewed concern for procedural autonomy. In particular, the Court's reasoning shows deference to the legislative discretion of the Member States

130. Ibid., para 44.

131. See Opinion in Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 81.

132. Case C-627/19 PPU, *ZB*, EU:C:2019:1079.

133. As for the review of proportionality in such cases, the Court found that "where a European arrest warrant is issued for the purposes of executing a sentence, it follows that it is proportional from the sentence imposed, which, as is clear from Article 2(1) of Framework Decision 2002/584, must consist of a custodial sentence or a detention order of at least four months"; ibid., para 38.

when implementing the FD-EAW.[134] The ECJ accepts that procedural rules leading to a review in court may vary from one system to another. Hence, establishing a separate right of appeal against the decision to issue an EAW taken by a judicial authority other than a court "is just one possibility in that regard".[135] On this basis, the Court goes on to find that a pre-existing remedy to challenge the national decision on which the EAW is based is enough to meet the requirement of effective judicial protection. It is apparent that in the cases mentioned above, the Court draws on the notion of procedural autonomy, read into the FD-EAW, to construe a minimalistic understanding of the "dual level" doctrine. Such discrepancy within the Court's case law has no evident explanation and may only be understood in light of the long-standing reluctance to allow for an extensive protection of fundamental and procedural rights in the EAW system. Authors have suggested that some recent rulings ought to be read as an attempt to close the Pandora's Box that was opened with the decisions in *OG & PI* and *PF*.[136]

Be that as it may, this minimalistic interpretation has the effect of lowering the level of judicial protection for the sake of a more rapid surrender. As the Advocate General points out, the principle of effective judicial protection of the court proceedings referred to in paragraph 75 of the judgment in *OG and PI* requires that a defendant may "intervene and participate, in exercise of his right of defence". This interpretation reflects the requirement of adversarial proceedings which flows from Article 5(4) ECHR and the right to be heard. None of these aspects have been considered by the ECJ, which confines itself to limited indications regarding the judicial oversight of the issuing decision. Admittedly, the ruling in *NJ* clarifies that when endorsing the EAW issued by a prosecutor, the competent court must be able to carry out an objective and independent review. However, no reference is made to the opportunity to attend the hearing in person, as this procedural safeguard is hard to reconcile with the cross-border nature of EAW proceedings. At the same time, the Court seems to accept the point made by Advocate General Campos Sánchez-Bordona that an appeal giving rise to "court proceedings" should not only be available *ex post*, after a person has been surrendered.[137] This explains why the ECJ insists on the duty set forth by Article 10 of Directive

134. Joined Cases C-566 & 626/19 PPU, *JR & YC*, paras. 51 and 64: "it is for the Member States to ensure that their legal orders effectively safeguard the level of judicial protection required by Framework Decision 2002/584, as interpreted by the Court's case-law, by means of the procedural rules which they implement and which may vary from one system to another".

135. Ibid., para 65.

136. Harkin, op. cit. *supra* note 40, 524. Other authors claim that, at the origin, the choice of including prosecutors within the notion of "judicial authority" is necessary to avoid an operational paralysis of the EAW system; Mitsilegas, op. cit. *supra* note 55, 68.

137. Opinion in Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 91.

2013/48/EU (right of access to a lawyer) to inform the person concerned "without undue delay after they have been deprived of their liberty that they have the right to appoint a lawyer in the issuing Member State".[138] The lawyer in the issuing State may provide its peers in the executing State with information on the legal remedies available in the State which issued the warrant, "with a view to having a court in that Member State review compliance with the conditions for issuing a European arrest warrant".[139]

The obligation to provide for effective judicial protection before the person is surrendered has been fleshed out more clearly in the recent case of *PI*.[140] Here, the ECJ goes a step further and draws explicitly on Article 47 CFR. The question referred involved the scrutiny of Bulgarian legislation which provides for judicial oversight of the prosecutor's decision to issue an EAW only *after* the person is surrendered to the issuing State. However, for such protection to be effective a "judicial review of either the European arrest warrant or the judicial decision on which it is based" must be possible "before that warrant is executed".[141] This requirement is a corollary of the "dual level doctrine" and can be inferred from Article 8(1)(c) FD-EAW concerning the prior adoption of a national warrant on which the EAW is based. As explained by Advocate General Richard de la Tour, it follows from the principle of mutual trust that at least the prior national decision shall be subject to a judicial review in court. The ECJ, however, has not interpreted the FD-EAW in such a way as to require that a national warrant is *always* subject to judicial oversight.[142] This is one of the poisonous fruits of the interchangeability of the two levels of protection and may expose the EAW system to a deviation from *habeas corpus* guarantees and the ECHR.[143]

8. Conclusion

This article has analysed a particular strand of the case law on the EAW, involving the definition of the term "judicial authority". The article's reasoning has sought to nuance claims that the principle of effective judicial

138. Joined Cases C-566 & 626/19 PPU, *JR & YC*, para 73.

139. See Opinion in Case C-648/20 PPU, *PI*, EU:C:2021:115, para 100.

140. Case C-648/20 PPU, *PI*, para 48.

141. Ibid., para 48.

142. The two levels are presented as alternative, see again ibid., para 48, which speaks of judicial protection "of *either* the European arrest warrant *or* the judicial decision on which it is based" (emphasis added).

143. It follows from the paragraph mentioned in the previous footnote that domestic law may allow for a judicial scrutiny of the decision to issue the EAW, without this decision being based on a national procedure involving a review in court of the NAW.

protection is conducive to an ever-growing erosion of national procedural autonomy. While such claims may partly hold true, the case of the FD-EAW shows that when handling effective judicial protection, the ECJ is alive to the priorities informing a specific policy area and seeks to avoid a disruption of consolidated procedural arrangements under national law. Nonetheless, the journey through the relevant ECJ case law illustrates a penetrating erosion of national procedural autonomy. Such erosion takes the form of negative and positive obligations. In addition, the case law confirms that the ECJ is increasingly reliant on a "dialogue" between issuing and executing authorities to uphold the effectiveness of the surrender mechanism.[144] It is noticeable that these constraints are underpinned by a need for enhanced protection of fundamental rights, notably with the requirement to ensure more effective judicial protection. In the case law analysed, the compression of procedural autonomy goes hand in hand with an attempt to further the goals of judicial cooperation. More specifically, the logic of mutual trust has been instrumental in pushing for higher standards of judicial oversight and ensuring the mutual enforcement and monitoring of fundamental rights between Member States. When such standards are not complied with, a surrender request may be declared invalid.

On the other hand, the ECJ's interpretation reveals concerns for the operability of the EAW system. It may be argued that the ECJ has tried to moderate the implications of its case law when these had the potential of disrupting mutual recognition in practice. The Court has interpreted the notion of "judicial independence" to uphold the place of prosecutors within the mechanism designed by the Framework Decision. Admittedly, the criteria set by the rulings in *OG & PI* and *PF* guarantee that prosecutor's offices are insulated from political interference. The role of the executive must be confined to tasks of administrative support. However, the understanding of "independence" in these rulings lacks the necessary coherence when compared to the Court's decisions in the context of its case law on the rule of law backsliding (see section 6 above). Such lack of coherence may be detrimental to the Court's credibility, and creates loopholes in the level of protection under EU law. Notably, the ECJ overlooks the requirement of internal independence of prosecutors and fails to expand on further procedural guarantees deriving from Article 6 ECHR. In addition, the rulings analysed in this section extend the notion of judicial independence to bodies which are

144. See for a comprehensive analysis of this dialogical model within the EAW system, Mitsilegas, "Mutual recognition and criminal law" in Iglesias Sanchez and Gonzalez Dominguez (Eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press, 2021), p. 253.

notoriously deprived of adjudicatory tasks and are thus unable to activate the mechanism of Article 267 TFEU.[145]

To cope with the different ways in which the EAW impacts fundamental rights, the ECJ has made clear that surrender proceedings are based on a dual level of judicial protection. This illustrates the secondary argument made in this article: namely that the notion of judicial authority under the FD-EAW cannot be disconnected from a system of effective judicial remedies, especially when warrants are issued by non-court bodies. While the Court's case law on this point provides a major contribution to uphold the right to liberty in a cross-border context, the judgments analysed reveal a great many ambiguities. In particular, the case law fails to draw the necessary conclusions from Article 6 CFR and little reference is made to *habeas corpus* as a special set of safeguards to protect the right to liberty. What is more, some recent rulings regard judicial remedies against national arrest warrants as functionally equivalent to court proceedings initiated to challenge an EAW. Such conflation may have the effect of reducing the effective protection of the right to liberty, when judicial oversight is ensured at only one of the two levels of protection. Fortunately, some judgments indicate that judicial protection at each of the two levels serves a different purpose, thus recognizing that cross-border transfers affect fundamental rights in a manner that goes beyond a mere deprivation of liberty.

145. One may wonder whether the rights of requested individuals could ever receive effective judicial protection under EU law if the authority enabled to issue a warrant is not granted the right to make a preliminary reference.